No. 10445.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BENJAMIN ROSE and LOUIS VITAGLIANO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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This is an appeal from judgments of conviction of Benjamin Rose and Louis Vitagliano of "conspiracy to commit offense against the United States, that is to say, to sell, lease, ship and transfer new rubber tires, casings and tubes to consumers and other persons in violation of statute [R. 78], executive orders, regulations and directives hereinbefore referred to."

The statute referred to was Subsection (a) of Section 2 of Title III of Public Law 507, 77th Congress, approved March 27, 1942, and commonly known as the Second War Powers Act. [R. 77.]

On February 11, 1942, the said Office of Price Administration made,[1] issued and duly promulgated "Tire Ra-

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[1]The Office of Price Administration was not created by the Second War Powers Act. It is authorized by the Emergency Price Control Act of 1942.

tioning Regulations (Revised)," effective February 19, 1942, and superseding Tire Rationing Regulations theretofore issued on December 30, 1941, which said regulations, effective February 19, 1942, prohibited the sale, lease, loan, trade, shipment, delivery or transfer of new rubber tires and tubes or of retreaded or recapped rubber tires without certificates issued by local tire rationing boards and except as otherwise provided in said regulations. Said regulations were issued under Subsection (a) of Section 2 of Title III of Pub. L. 507, 77th Cong., approved March 27, 1942, and commonly known as the Second War Powers Act.

Appellants were dealers and service station men and had a lawful right to handle tires with each other. It will be shown that they did not conspire to violate any of the regulations. The defendant Rose was sentenced to a year and a day in a penitentiary type of institution, and fined the sum of $2,000. [R. 21.] He was at the time of his trial in the Coast Guard of the United States and had suffered a serious injury which required him to sit through the trial with his leg propped up. The defendant Vitagliano was given a sentence of six months in the County Jail and fined $1,000. [R. 22, 23.]

As the facts will be more fully stated under the heading of the Court's error in failing to direct the verdict, no extended statement will here be set forth.

A complete summary of the testimony is contained in an appendix for the purpose of considering the sufficiency of the evidence.

The appellants assign the following errors in the record:

I.

The District Court erred in its decision overruling the defendants' demurrers to the indictment on each of the grounds therein specified.

(a) The indictment is fatally defective in charging a conspiracy to violate the Second War Powers Act of 1942, passed on *March 27, 1942,* wherein it alleges that the conspiracy to violate that Act occurred on *December 12, 1941.*

(b) The indictment is fatally defective in alleging violations of regulations purportedly issued under the Second War Powers Act, which regulations were issued *prior* to the Second War Powers Act.

(c) The indictment is fatally defective in referring merely to the statute and not charging what act or omission was in violation of the statute.

(d) The indictment is fatally defective in failing to specify the particular conduct which it is alleged was forbidden by any applicable regulation and in failing to descend to particulars as required by the Sixth Amendment to the Constitution of the United States.

(e) The indictment is fatally defective in that it fails to negative the exceptions in the regulations, which exceptions were applicable to the defendants, who were dealers and exempt under the regulations.

(f) The indictment is fatally defective in merely referring to statutes and regulations generally and by reference and without setting forth the provisions of the statutes and the regulations.

II.

The indictment fails to state an offense against the laws of the United States.

III.

The District Court erred in refusing a bill of particulars.

IV.

The District Court erred in failing to direct a verdict.

V.

The District Court erred in failing to grant the motions to strike the evidence.

VI.

The District Court erred in failing to grant the motions and arrest the judgment.

(a) For failure to state an offense against the laws of the United States.

(b) For all of the defects set up in the grounds of the demurrer.

(c) For violation of the Fourth and Fifth Amendments to the Constitution of the United States.

VII.

The Second War Powers Act is too vague, indefinite and uncertain to form a standard of penal conduct and therefore violates the Fifth Amendment to the Constitution of the United States.

VIII.

The District Court erred in overruling the motions in arrest of judgment.

I.

The District Court Erred in Overruling the Demurrer to the Indictment.

A. The indictment charges the appellants with violating Subdivision (a) of Section 2 of Title 3, Public Law 507; 77th Congress, approved March 27, 1942, and commonly known as the "Second War Powers Act."

The offense of conspiracy is alleged to have taken place December 12, 1941, or more than a year and two months before the passage of the Act. Also, the indictment charges that the regulations were issued under the Second War Powers Act [R. 77], when, as a matter of fact, the Second War Powers Act had not yet passed and the regulations referred to are dated February 11, 1942, February 19, 1942, and December 30, 1941. [R. 77, referring to Section 12 in the indictment.]

In *United States v. Eaton,* 144 U. S. 677, 688, 36 L. Ed. 591, 592, 593, the court held that the Secretary of the Treasury cannot buy his regulations, alter or amend a revenue law; all he can do is to regulate the mode of the proceeding to carry into effect what Congress has enacted, and he has no authority to prescribe a regulation which would substantially prescribe a criminal offense by the regulation of the Department.

See also the following cases:

St. Louis Merchants Bridge T. Railroad Co. v. United States (8th Cir.), 188 Fed. 191;

United States v. Maid, 116 Fed. 650;

United States v. Ballard, 12 Fed. Supp. 321;

Schecter v. United States, 295 U. S. 495, 79 L. Ed. 1570;

United States v. Louisville & N. R. Co., 176 Fed. 942;

Asgill v. United States, 60 Fed. (2d) 780.

B. The indictment does not state an offense against the laws of the United States in that it is too vague, indefinite and uncertain to apprise the accused of the specific thing with which they are charged.

The references to the orders are general. The references to the alleged conduct or misconduct are too vague and general.

Constitution of the United States, Sixth Amendment;

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, Fed. Case 14455, 2 Paine 451;

U. S. v. Simmons, 96 U. S. 360, 24 L. Ed. 819;

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;

U. S. v. Carll, 105 U. S. 641, 26 L. Ed. 1135;

U. S. v. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229;

U. S. v. Morrissey, 32 Fed. 147;

U. S. v. Reichert, 32 Fed. 142;

Wishart v. U. S. (8th Cir.), 29 Fed. (2d) 103;

Peters v. U. S., 94 Fed. 127;

Olmstead v. U. S., 29 Fed. (2d) 239;

Brenner v. U. S., 287 Fed. 636;

Shaw v. U. S., 292 Fed. 339;

Haynes v. U. S., 4 Fed. (2d) 889;

Lynch v. U. S., 10 Fed. (2d) 947;

Asgill v. U. S., 60 Fed. (2d) 780 and cases therein cited;

Kerns v. U. S., 74 Fed. (2d) 251;

Pierce v. U. S., 86 Fed. (2d) 949;

Reimer-Gross Co. v. U. S., 20 Fed. (2d) 36;

U. S. v. Strobach, 28 Fed. 902;

U. S. v. Brazeau, 78 Fed. 464;

Azuma Kubo v. U. S., 31 Fed. (2d) 88;

Martin v. U. S., 168 Fed. 198;

Ackley v. U. S., 200 Fed. 217;

U. S. v. Bopp, 230 Fed. 723;

Boykin v. U. S., 11 Fed. (2d) 484;

U. S. v. Cowell, 243 Fed. 730;

U. S. v. Louisville & N. R. Co., 165 Fed. 936;

Hall v. U. S., 89 Fed. (2d) 578;

Harris v. U. S., 104 Fed. (2d) 41.

C. The indictment states facts which all could be innocent, as the defendants were authorized dealers in tires and under O.P.A. Section 801 a retailer may, without certificate, transfer any new tires or tubes to any retailer, distributor, wholesaler or manufacturer.

Under the Sixth Amendment to the United States Constitution a defendant is entitled to be informed of the nature and cause of the accusation so that the court may know if an offense has been charged in the first instance. Where, by the language of an indictment the defendant may or may not be innocent, the presumption of innocence prevails, and no public offense is charged. If under the

language of the indictment the defendants could have done each and all of the things charged without being in violation of any law, no public offense against the laws of the United States is charged.

People v. Schmitz, 7 Cal. App. 330;

People v. Davenport, 21 Cal. App. (2d) 292.

Count I of the indictment was insufficient in that the statute executive orders, regulations and/or directives referred to contain numerous *exceptions* which are so incorporated in the language defining the conduct that the ingredients of the conduct cannot be accurately described because the exceptions are omitted. It is a well-known rule of criminal law that where exceptions are a part of the definition of an offense they must be pleaded.

U. S. v. Cook, 84 U. S. 168, 21 L. Ed. 538;

Reing v. U. S., 84 Fed. (2d) 624.

Count I of the indictment was insufficient in that it failed to allege whether any of the defendants were retailers, distributors, wholesalers or manufacturers, as defined by Supplementary Order M-15-C. Without such allegations the indictment did not state an offense, and the defendants were entitled to be informed specifically by the indictment whether they were in the forbidden category.

U. S. v. Cook, 84 U. S. 168, 21 L. Ed. 538.

D. The indictment failed to allege whether or not the defendant Rose was a retailer, distributor, wholesaler or manufacturer within the meaning and purview of Supplementary Order M-15-C, Subdivision 4, which permitted selling, leasing, trading, lending, delivering, shipping and transferring of new tires, casings and tubes by any re-

tailer to another retailer or to any distributor, wholesaler or manufacturer.

The indictment also failed to allege the specific regulations which it is alleged were the object of the conspiracy.

Such omissions vitiate the indictment.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

Asgill v. U. S., 60 Fed. (2d) 780;

U. S. v. Louisville & N. R. Co., 176 Fed. 942;

Schecter v. U. S., 295 U. S. 495, 79 L. Ed. 1570;

United States Constitution, Article I, Sections 1 and 8;

U. S. v. Eaton, 144 U. S. 677, 36 L. Ed. 591.

The Second War Powers Act fails to define a crime with definiteness and certainty, and therefore is violative of the Fifth Amendment to the Constitution of the United States.

U. S. v. Reese, 92 U. S. 214;

Conally v. General Const. Co., 269 U. S. 385, 7 L. Ed. 322;

Lanzetta v. New Jersey, 306 U. S. 457;

U. S. v. 11,150 Pounds of Butter, 195 Fed. 657;

U. S. v. Resnick, 299 U. S. 207, 81 L. Ed. 127.

E. The Second War Powers Act does not contain any penal provisions relating to the matters herein charged. In every crime there must be conduct defined and a punishment provided.

U. S. v. Seibert, 2 Fed. (2d) 80;

U. S. v. Resnick, 299 U. S. 207, 81 L. Ed. 127;

People v. McNulty, 93 Cal. 427;

In re Ellsworth, 165 Cal. 677;

U. S. Ballard, 12 Fed. Supp. 321, and cases therein cited at 327.

For each of the foregoing reasons the demurrer to the indictment and the motions in arrest of judgment should have been sustained.

The Indictment Fails to State a Public Offense.

The instant indictment fails to state any offense known to the law. It is totally deficient in its attempt to charge a crime for the following reasons:

1. It is vague, uncertain and indefinite to the degree that it fails to inform the accused of the nature of the charge against them or to identify the offense attempted to be charged.

2. It shows on its face that the defendants are, if the allegations contained therein are true, innocent of any and all offenses attempted or purported to be set forth in said indictment.

The second ground will be first discussed and elucidated.

In the body of the indictment, a fraudulent conspiracy to violate certain laws is charged as the aim and purpose of the alleged conspirators.

First reliance is placed on decisions which have been quoted or cited in the argument involving the insufficiency of the evidence to sustain the conviction (caption I). These decisions not only considered the evidence insufficient but held the respective indictments bad.

However, it will be shown that these decisions coincide with and lead back to leading cases which sustain ground 1, above set forth.

In other words, *United States v. Biggs,* 157 Fed. 264; *Tillingham v. Richards,* 275 Fed. 226, and *Fain v. United States,* 209 Fed. 525, is not a group of Mavericks in the statements of law, applicable only to the precise facts involved. but are examples of cases factually similar to the instant case which were controlled by long and well-settled principles of the criminal law.

The composite doctrine of these three decisions is grounded upon the rule that an indictment fails to state facts which permit proof of a public offense, where in the charging clause, a conspiracy to do an unlawful act, fraudulently, is alleged as the object, and lawful, innocent overt acts are set forth, without any averments in the body of the indictment, of fact which show a causal connection to give a fraudulent aspect to overt acts, which, as described, are lawful and innocent.

In that behalf *Tillingham v. Richards* relies upon *U. S. v. Britton,* 108 U. S. 199, 27 L. Ed. 199.

The charge in the *Britton* case was conspiracy to violate Section 5209 of the Revised Statutes (The National Bank Act). The indictment contained 119 counts.

Concerning counts 37 and the counts similar to it, the opinion shows that they charge conspiracy to do an unlawful act fraudulently. These counts were held "bad" because it is said, they do not fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant "willfully misapplied" the funds of the association. There must be

averments to show how the application was made, and that it was an unlawful one. This is well settled by the authorities we have already cited.

Finally it is said:

> "The failure of the counts under consideration to aver that the purchase of the shares of the association was not necessary to prevent loss upon a debt previously contracted in good faith is a fatal defect. These counts merely charge that the defendant willfully misapplied the funds of the association, and then aver a use of the funds which, from all that appears to the contrary, was a perfectly lawful application of them. The result is, that no offense is described in the counts numbered from 37 to 56, inclusive, and that they are, therefore, insufficient and bad." (pp. 525, 526.)

The principal authorities above referred to as having been cited are *U. S. v. Simmons*, 96 U. S. 362 and *U. S. v. Carll*, 105 U. S. 611, and the excerpts quoted from these opinions merely state certain fundamental principles which condemn uncertainty in pleading.

From the *Simmons* opinion is quoted this language:

> "'* * * there is a qualification fundamental in the law of criminal procedure, that the accused must be apprised in the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution against him.'"

From the *Carll* decision the following is quoted:

> "'In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the

> statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.' "

Thus the *Britton* case announces the exact principle and rule laid down in the *Fain, Biggs* and *Tillingham* cases and regards that rule and principle as warranted and required by a more general rule which is "fundamental to the law of criminal procedure."

United States v. Carll, in turn, granted a motion in arrest of judgment on the jurisdictional ground that the averments of the indictment were insufficient to state an offense because its charging clause, being in the general language of the statute, omitted the essential element of intent to defraud and charged as a crime an act which was not unlawful, without an averment of further facts to show illegality, citing the famous decision in *U. S. v. Cruikshank,* 92 U. S. 582.

In the last named case the charge was conspiracy to do an unlawful act fraudulently. It employed the generic language of the law which made it unlawful to conspire to hinder a citizen in the free enjoyment of any right or privilege granted by the Federal Constitution.

It failed to specify what right or to plead facts showing the intent to prevent the enjoyment of such right.

The opinion declares "facts are to be stated and not conclusions of law alone" and it is said, "the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense charged."

With this background and lineage the *Tillingham*, *Fain* and *Biggs* decisions are, it seems, impregnable. They have applied the same rule which caused the Supreme Court in the *Cruikshank* and *Carll* cases to hold that a motion in arrest after conviction should have been granted where the body of the charge was defective to similar defects in the description of the overt acts. They show clearly and logically that conclusions alone were pleaded in the charging clause and that with no averments of causal connection the lawful overt acts set forth could not possibly "support a conviction for the offense charged," and that, as phrased in the *Carll* decision, without averments of showing illegality the lawful acts set forth as overt acts cannot enlarge the defective charge in the body of the indictment into an offense.

1. The Indictment Fails to Charge a Public Offense Because It Is Vague, Uncertain and Indefinite.

It is difficult to conceive of a more indefinite and uncertain charge than that contained in the instant indictment.

It reads:

> "Beginning on or about December 12, 1941, and continuing thereafter up to and including the date of the return of this indictment, the defendants Mac

> R. Brown, Joseph Lieb, Benjamin Rose, Phil Rezniche, Phil Taplin, Louis Vitagliano and Sam Weinstein, and other persons whose names are to the Grand Jurors unknown, in the County of Los Angeles, State of California, division and district aforesaid, did unlawfully, wilfully, knowingly, corruptly, fraudulently and feloniously engage in a conspiracy to commit offenses against the United States, that is to say, to sell, trade, lease, ship and transfer *new rubber tires, casings, and tubes to consumers* and other persons in violation of the statute, executive orders, regulations and directives hereinbefore referred to." (Italics ours.)

Several regulations and two directives and the entire act authorizing the creation of the OPA were "hereinbefore referred to." [R. 74-77.]

The charge is in the generic language of certain of these regulations and it is generic throughout.

It is conceivable that persons could conspire to violate *all* provisions of the statute and the directives and of the regulations of the OPA. However, the indictment does not so aver. It specifies that the accused conspired to do acts in violation of said instruments, but makes no attempt to specify what acts were planned to be done or to identify them.

This indictment violates fundamental rules of criminal procedure all based upon the general principal that the accusation must be so definite and certain that the defendant may know the precise offense with which he is charged so that he may prepare his defnse and be protected from further prosecution for the same offense and to inform the court, so that it can determine whether an

offense is charged and, if so, what offense, and whether it is one over which the court has jurisdiction.

Cruickshank v. U. S., 92 U. S. 542.

In *Armour Packing Co. v. U. S.*, 209 U. S. 56, it was said:

Rosen v. U. S., 161 U. S. 29, 40 L. ed. 606;
U. S. v. Carll, 105 U. S. 611, 26 L. ed. 1135;
U. S. v. Simmons, 96 U. S. 360, 24 L. ed. 819.

The fundamental rules thus comprehended are stressed separately in the following groups of decisions:

1. In *Jarl v. U. S.*, 19 F. (2d) 851, it was held that an indictment which does not so identify the charge that the accused may not be *put on trial* for an offense other than the one covered in the indictment and so that he may be protected from being twice put in jeopardy is "fatally defective."

In *Anderson v. U. S.*, 260 Fed. 557, the indictment charged that defendant "unlawfully, etc., conspired" with others to commit an offense against the United States, that is, "to steal from a certain railway car certain goods then and there moving as a part of interstate shipment, with intent to convert said goods to their own use."

The demurrer on the ground that the indictment insufficiently described the alleged offense was overruled and in error, was reversed.

It was held that if the statute employs broad and comprehensive language descriptive of the general nature of the offense, the use of such language is insufficient to identify the offense attempted to be charged.

It is said:

> "As the conspiracy is the gist of the offense, it is undoubtedly true that the offense which it is charged the defendant conspired to commit need not be stated with that particularity that would be required in an indictment charging the offense itself. Still, as was said in Williamson v. U. S., 207 U. S. 447, the offense which the defendant conspired to commit must be identified."
>
> "Standing alone, we are of the opinion that the above-quoted language from the indictment wholly fails to comply with the rules of criminal pleading. The words *'certain railroad car'* might apply to any one of the vast number of cars in existence in the United States; and for the same reason the words *'certain goods'* might apply to any kind of the thousand varieties of property. The car might be moving in interstate commerce on any railroad in the United States and between any two of the great number of towns existing in different states. The *kind* and character of the goods are not stated. In order to constitute the crime of stealing, several elements must be established. The defendant, if convicted or acquitted on this indictment, could not plead the conviction or acquittal *in bar,* as far as the indictment is concerned, if he was again indicted for the same offense, because *the offense is not identified.* We are therefore clearly of the opinion that the charge of conspiracy *is fatally defective* when standing alone."

The court further held that indictment cannot be aided by averments of overt acts done by one or more of the conspirators in furtherance of the object of the conspiracy.

2. Where an indictment pleads one or more of the essential elements of the crime attempted to be charged in generic language, it fails to state an offense.

Sulla v. U. S., 104 Fed. 544 (9th Cir.);
Keck v. U. S., 172 U. S. 435; 42 Fed. 505;
Hess v. U. S., 124 U. S. 483, 31 L. ed. 516;
U. S. v. Robinson, 266 F. 240.

(a) Such generic language states no matters on which an issue could be submitted to a jury.

Keck v. U. S., 172 U. S. 435;
Hess v. U. S., 124 U. S. 483.

(b) Such an indictment denies the accused the right guaranteed by the Fifth Amendment to be protected against double jeopardy. It violates the right to be informed of the nature of the charge, guaranteed by the Sixth Amendment. The protection thus afforded begins back of the trial and with the indictment and renders all that follows nugatory.

U. S. v. Cruickshank, 92 U. S. 542;
Nielson v. U. S., 131 N. S. 176;
Bens v. U. S., 226 Fed. 152;
U. S. v. Taffee, 86 Fed. 113.

(c) Such an indictment states "No offense known to the law."

Hess v. U. S., 124 U. S. 483, 31 L. ed. 516;
Boykin v. U. S., 11 F. (2d) 484;
Shaw v. U. S., 292 Fed. 339.

(d) Such an indictment is a nullity and is "dead."

Foster v. U. S., 253 Fed. 481 (9th Cir.);
Hess v. U. S., supra.

(e) Under an indictment which pleads the charge in generic language, only, the court is wholly without jurisdiction over the subject matter.

U. S. v. Rogoff, 163 Fed. 311.

(f) The defect is one of substance and not merely of form. It goes to the very life of the indictment.

U. S. v. Ford, 34 Fed. 26;
Jarl v. U. S., 19 F. (2d) 891.

If these are the consequences which result from pleading in generic terms and failing to "descend to particulars" where conspiracy to violate congressional acts is charged, by what process of reasoning can it be held that directives and administrative regulations, created solely through delegated authority are immune and exempt, and may be made the basis of prosecutions in defiance of constitutional restrictions? The Government is invited to supply the answer.

In the past it seems that prosecutors have sought to avoid the effect of the fundamental rules above set forth by arguing that a bill of particulars would supply the defects in the indictment.

To that contention it was said in *Foster v. U. S.,* 253 Fed. 481 (9th Cir.):

> "The bill of particulars could not avail to cure the defect of the indictment. It does not constitute a part of the record and it is not subject to demurrer.

> Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot 'give life to what was dead when it left the grand jury.'"

In *United States v. Dowling*, 278 Fed. 630, the court observed:

> If the indictment is good against general demurrer the defendant may resort to a motion for a bill of particulars, "If, however, it is bad, the remedy is by demurrer or by motion in arrest of judgment."

To the same effect, see:

Jarl v. U. S., 19 F. (2d) 891.

II.

The District Court Erred in Denying the Defendants' Motions for a Bill of Particulars.

The defendants moved for a bill of particulars [R. 83, 84] which motions were denied and exceptions noted. They were entitled to a bill of particulars because of the multiplicity of regulations and their right to know what they were charged with having violated so that they could be prepared to meet the charges. The refusal to grant the bill of particulars was an abuse of discretion on the part of the court.

Glasser v. U. S., 86 L. Ed. 680;

Bartell v. U. S., 227 U. S. 427, 57 L. Ed. 583;

Durland v. U. S., 161 U. S. 306, 316, 40 L. Ed. 709.

III.

The District Court Erred in Denying the Defendants' Motion to Dismiss the Government's Case at the Close of the Opening Statement.

The Government's opening statement did not constitute a violation of the laws of the United States. No conspiracy had been set out in the facts set forth in the Government's opening statement. In view of this failure to set out a case in the opening statement the defendants were entitled not to be put through a long, difficult and expensive trial. One of the rights of persons is to be free from needless litigation. Here, the Government's opening statement did not set out facts constituting an offense.

It must be presumed that the court knew nothing about the case. The court attempted to aid the prosecutor in adding to his opening statement sufficient to enable the court to overrule the defendants' motion. [R. 119.] It is respectfully submitted that the defendants were entitled to have their motions granted on the statement of facts of the prosecutor who represented the Government.

U. S. v. Weissman, 266 U. S. 377, 69 L. Ed. 334.

IV.

The District Court Erred in Failing to Direct the Verdict. The Evidence Was Insufficient to Justify the Verdict.

The verdict should have been directed for the defendants as the evidence is insufficient to support the verdict. The only testimony in the record as to any transaction that allegedly violated the regulations of the Office of Price Administration was the testimony of Leo Isenhower [R. 276] in which he testified that he had a conversation with Benjamin Rose with reference to the purchase of some inner tubes. Isenhower testified that he saw Mr. Rose at one of his laundry stops, a service station on Western Avenue. Isenhower was a laundry driver and picked up laundry. He met Rose at this station. A conversation arose and Isenhower said that he needed some inner tubes for his trucks and did not know where he could get them. [R. 277.] The sum and substance of the conversation was that Rose had some inner tubes for sale and the price was around $4 apiece. There were five or six inner tubes in a box that Rose brought along on a subsequent occasion. Isenhower said that he did not have any certificates to obtain the tubes and didn't feel that he needed them. [R. 278.] There is no testimony as to what kind of tubes they were, whether *new* (as alleged in the indictment) or used, nor was there any testimony offered as to the character of the tubes nor that Isenhower was doing anything except laying in a stock.

This testimony shows that there is no connection between this isolated transaction and the conspiracy alleged in the indictment. It is not shown that these tubes were a part of any tubes that were a part of any alleged con-

spiracy nor that this was anything more than an individual transaction between Rose and Isenhower. Such an action does not constitute a conspiracy. The fact that the act of an individual in an individual transaction does not make out a conspiracy.

In the case of *People v. Covington,* 1 Cal. (2d) 316, three defendants were charged with the crime of robbery. It appears that they had broken into the house of a young woman and waited for her and a man to come home. After the defendants had been for some time in the house two young women came home and proceeded to entertain the defendants. One of the young women was hit with a sap or blackjack by one of the defendants and as a result of the blow she died a short time afterwards. Thereafter the other defendants took some jewelry from the house. The court held that the other defendants who took the property subsequent to the murderous attack were guilty of petty theft and that this was a separate and distinct transaction.

See also:

16 *Corp. Jur.* 135;
People v. Keefer, 65 Cal. 232, 3 Pac. 818;
State v. May, 142 Mo. 135, 43 S. W. 637;
People v. Keroff, 26 Mich. 112;
People v. Covington, 1 Cal. (2d) 316;
People v. Creeks, 170 Cal. 369, 373;
People v. Kaufman, 152 Cal. 331, 334;
People v. King, 30 Cal. App. (2d) 185;
People v. Shurtleff, 113 Cal. App. 739;
Langer v. U. S., 76 Fed. (2d) 817;
Becher v. U. S., 5 Fed. (2d) 45.

We will hereafter set forth a complete analysis of the evidence showing its entire insufficiency. We have appended at the close of this brief a complete summary of the evidence on this point.

The indictment in this case is drawn under Section 5440 of the Revised Statutes (Title 18 U. S. C., Sec. 88).

It charges a conspiracy in violation of that section, to-wit, to defraud the United States, in that they "did unlawfully, wilfully * * * fraudulently and feloniously engage in a conspiracy to * * * sell, trade, lease, ship and transfer rubber tires, casings tubes to consumers and other persons in violation of the statute, executive orders and directives hereinbefore referred to," which statute, executive orders and directives consist of the act authorizing the creation of the O.P.A., directives of the President creating the same and restricting and regulating the sale of rubber and dealing in new rubber tires, tubes, etc., and regulations of the O.P.A. in that behalf.

Of the ten overt acts charged (designated (a) to (j), inclusive), five of them (c), (e), (g), (h) and (j), charge fraud or deceit; all of these acts are innocent and lawful *per se;* and no one of them tends, in any perceptible manner, to violate any of said directives or regulations.

To secure a lawful conviction it was essential that the prosecution prove one of the overt acts as laid in the indictment; and this is the law regardless of whether other overt acts are proved.

Fredericks v. U. S., 292 Fed. 856;

Weinstein v. U. S., 11 Fed. (2d) 505.

It necessarily follows that if none of the overt acts are relevant, material or competent and if it was error for them to have been admitted and for the court to have refused to strike such testimony from the record, convictions were illegally obtained because there is no competent evidence in the record to warrant the verdict or the judgment.

Appellant proposes to sustain this legal hypothesis and to show that each and all of the overt acts set forth in the instant indictment was lawful and innocent; that, as set forth, none of the overt acts could possibly have had any causal connection with the unlawful conspiracy as averred in the charging clause of the indictment and that, as a matter of law, under these circumstances, said overt acts could not possibly have been committed in furtherance of the alleged conspiracy.

The decisions upon which appellant principally relies to establish this ground for reversal of the conviction are:

Fain v. United States, 209 Fed. 525;

United States v. Biggs, 211 U. S. 507, 53 L. Ed. 305;

Tillingham v. Richards, 225 Fed. 226.

In *Fain v. United States,* 209 Fed. 525, it was said:

> "It is neither criminal nor unlawful to do or to conspire to do that which the law does not prohibit but recognizes may be lawfully done without prejudice or injury to the United States," citing *United States v. Biggs,* 211 U. S. 507, 521.

In that case the defendants were charged with conspiracy to violate Section 5440, revised Statutes, by in-

ducing "persons to make false entries on public lands, to procure and to hold for sale for their own profit relinquishments by homestead entrymen, and to make and cause to be made false and pretended contests of homestead entries for the purpose of preventing the lands covered by them from being entered by other qualified entrymen until they could sell their relinquishments for their own benefit."

As overt acts, it was alleged that:

(a) Kammerer, Strunk, and Rogers made honest and valid homestead entries of their respective tracts of land.

(b) That in September, 1909, the defendants purchased the relinquishments of these homesteaders.

(c) That in October, 1909, Baker instituted a contest against Kammerer on the grounds that he had offered his relinquishment for sale, and had sold it to one Smith, when the fact was that he had not sold it to Smith, but had sold it to defendants, and that he had abandoned his homestead for more than six months.

(d) That Kammerer's relinquishment was not filed until November 3, 1909, when Baker withdrew his contest and Ernest C. Collier, to whom Kammerer's relinquishment had been sold, entered the land as his homestead.

(e) That on September 7, 1909, Fain filed an affidavit of contest against Strunk on the ground that he had offered his relinquishment for sale, and had sold it to one Dennie Y. Hennold, when the fact was that he had not sold it to Hennold.

(f) That two other contests of Strunk's claim were filed on September 7, 1909.

(g) That on October 14, 1909, Fain filed an amended affidavit to the effect that Strunk had abandoned his homestead for more than six months.

(h) That five junior contests for this tract of land were subsequently instituted.

(i) That the relinquishment of Strunk has never been filed, and Fain's contest is still pending.

(j) That on October 25, 1909, the defendants caused K. T. Coffey to file an affidavit of contest of Rogers' entry, on the ground that he had abandoned his tract for more than six months, and Rogers' relinquishment was never filed.

The opinion shows that all of the proceedings were conducted pursuant to an act or acts providing for homesteading of public lands of the United States.

U. S. Comp. St. 1901 and 1907.

The court considers each of the overts separately and shows that none of them were prohibited, and that several were expressly permitted, among which were sales and contracts for sales of relinquishments and contests of claims, and it concludes that the defendants' motion to strike all evidence pertaining to such acts should have been granted because the overt acts "were not acts to effect the object of such conspiracy," and all of the evidence of such purchases, relinquishments, and contests was "inadmissible" to prove the charge in the indictment.

Another point determined, which is especially applicable in this case, was that it was shown that in some instances false affidavits had been filed in support of contests.

In that behalf the opinion states:

> "But counsel says the affidavits of contests were false. * * * The false statements were not material to prove perjury because they related to an immaterial issue, and because that offense was not charged in the indictment and its commission was not in issue. It is not a criminal offense for a litigant to delay the administration of the law by asserting, even under oath, in his pleading of proof the existence of a fact which did not exist. If it were, one or the other of the parties in many a contested lawsuit would either be deterred from asserting the existence of facts the proof of which would be essential to his rights, but doubtful, or would be liable to punishment for asserting their existence if he failed to prove them. No sound reason is discovered for the introduction in evidence or the consideration by the jury of the affidavits and contests of the entries of Kammerer, Strunk, or Rogers, or of their relinquishments or of the entries themselves. They should have been excluded from the consideration of the jury in the trial below."

Thus the situation in the instant case is exemplified by that in *Fain v. United States.*

There is no difference in principle between the two cases.

The essence of the *Fain* decision is that where none of the overt acts charged are unlawful and none of them as pleaded "tend * * * in any way to defraud" the United States "out of anything of value" evidence to

establish such overt acts is inadmissible because it is immaterial and irrelevant.

In the instant case there can be no doubt that overt act "(a)" in the indictment is wholly innocent. Phil Taplin, Sam Weinstein and Louis Vitagliano all held retail licenses. None of the directives or regulations described in the indictment applies to persons holding such licenses or restricts them in transporting rubber tires and tubes from one point to another.

It was the privilege of these men to transfer their tires and tubes to a chicken coop and store them therein or to pile them up on a vacant lot if they were willing to run the risk of theft or hi-jacking.

"(b)" overt act is equally lawful because Rose was a duly licensed dealer and so was Kreling from whom he purchased the tires. [R. 322; 160.]

"(c)" overt act is plainly immaterial and irrelevant. It cannot be doubted that Rose had a right to rent any premises in which to store his tires and tubes. His making a false representation to the owner of the premises in order to get the rental of the premises is even more plainly immaterial than were the false affidavits made by Baker and Fain in the *Fain* case. The false affidavits in that case resulted in a delay in the court contests therein involved. In this case the false representation attributed to Rose had no effect whatever upon any proceeding, nor could it, by any stretch of conjecture or suspicion, concern the O.P.A. or the administration of the lawful functions of that office. No regulation required Rose to keep the O.P.A. informed of the whereabouts of his tires and tubes. If he had any motive whatever in renting the premises in question other than for purposes of storage

it is fair to assume that he shared the prevalent resentment against the pernicious interference in his private business affairs of Government officers, who, it is commonly known, often, if not habitually, flaunt constitutional rights.

At any rate, neither in the indictment nor in the evidence is there the slightest factual showing that this false representation was in furtherance of the alleged conspiracy.

In "(d)" overt act, the situation is the same as in "(a)" and "(b)". Each of the parties, Kelher and Rose, were regularly licensed retail dealers and owned and conducted one or more shops where tires were sold. It was entirely lawful for Kelher to sell his rubber articles to Rose, and for Rose to buy them and transport them from Kelher's premises.

Overt act "(e)" was lawful in every respect. Slavett was a dealer in tires and had been at the same address for 12 years. [R. 208.] The only conceivable purpose for setting this act up is to reveal that Rose directed "the transfer man" to list the tires and tubes as "auto accessories" in "his statement of services rendered."

This item on the "statement of services rendered" could not deceive anyone. The invoices were properly made out, showing that the tires and tubes were sold to Rose. [R. 148.] The O.P.A. knew all about the transaction and it complied in every respect with directions given by that office to Slaver. [R. 147.] Under the *Fain* decision evidence of this overt act was clearly inadmissible and immaterial.

Overt act "(f)" was legal. Mac R. Brown was a retail dealer in tires and tubes and was doing business un-

der his license. [R. 156.] The same was true of Sam Parsner, and there could be no claim that it was a violation of the law for Vitagliano to help Brown move the tires which the latter had lawfully purchased.

Overt act "(g)" is trifling. No regulation makes it unlawful to lie to an investigator of the O.P.A. The warped concept which this office and the prosecutor had of a federal bureau and its assumed sanctity is the chief cause of the present chaos and confusion in the administration of that office. The presence of this overt act in the indictment can be accounted for on no other hypothesis. In the first place the investigator had no legal right to demand information from Rose as to whether he, Rose, had sold any tires or tubes which he owned. Of course, Rose was aware that this investigator was and had been snooping into Rose's affairs. Rose was under no obligation to tell the investigator anything. If he chose to say that he had sold the Kreling tires to Golden Lubricants, Inc., it was immaterial in this case, whether the statement was true or false. As a matter of fact the records show that the sale was made.

However the overt act, if proved, was clearly immaterial and irrelevant under the reasoning and decision of *Fain v. United States, supra.*

Overt act "(h)" is identical with "(e)" plus "(a)".

Overt act "(i)" is another example of a trifling averment, and one which evinces a belief in the past of the pleader that with the creation of the O.P.A. by presidential directive. Constitutional rights and guaranties were thrown in the discard, at least for the duration of the life of the O.P.A. Surely the averment of this overt act presupposes that constitutional property rights do not

exist. Upon no other theory can it be suspected that *any* unlawful purpose or design is indicated by the conduct of an owner who moves his property from a place where it was stored to a "place or places unknown." Since when has it become a ground of suspicion that an owner has moved his property without informing everyone where he placed it? The Government surely must believe that such a circumstance is more than suspicious—that it is either illegal or at least so bordering on illegality as to provide an inference of an unlawful design.

Otherwise under the sound doctrine of *Fain v. United States* (which has not been judicially overturned), overt act "(i)" is utterly meaningless and irrelevant and evidence concerning it was erroneously admitted.

Overt act "(j)" was just as innocent as the others. There is nothing in the regulations or the presidential directives which the defendants were charged with conspiracy to violate which forbids one retail tire dealer offering to sell tires to another such dealer. Doyle testified: "I had a retail tax permit. The firm had it for about six years." [R. 186.] Hence, although he said, "I did not ever sell tires," he had a right to start selling whenever he chose.

It has been shown that under the doctrine and reasoning of *Fain v. United States, supra*, none of the overt acts set forth in the instant indictment are relevant or material to the conspiracy which is charged in the indictment. The *Fain* decision cites *United States v. Biggs* in support of the proposition that it is neither criminal nor unlawful to do that which the law does not prohibit but which it recognizes may be done without prejudice or injury to the United States. The *Biggs* opinion so holds

and decides that all of the overt acts charged in the indictment construed by it were valid. In that case the purpose of the conspiracy, as charged, was to defraud, (Sec. 5440, U. S. Comp. St. 1901, p. 3676), by hiring, and under agreements with entrymen, having them "pay for lands with moneys of the corporation" and having them make entries.

The court concludes:

> "From the foregoing I conclude: First, that the agreements between the entrymen and defendants, as charged in the indictment, were neither void or voidable, but were enforceable contracts between the parties; second, that the acts charged are neither prohibited by statute and unlawful, nor *mala in se,* nor do they involve moral turpitude; hence, whether we consider them either as means to accomplish an end or as the end to be accomplished, they do not constitute a crime. The indictment, therefore, does not charge an offense."

Thus it appears that the *Fain* and *Briggs* decisions are in accord.

The significance and reasons for these decisions is clarified and emphasized by another Federal opinion which supplements those just named, approaching and deciding the same question in a slightly different form. This decision was rendered in *Tillingham v. Richards,* 225 Fed. 226.

The indictment in the *Tillingham* case charged conspiracy to defraud the United States of sums of money to become due for internal revenue taxes.

It is pointed out in the opinion, by Judge Brown, that the indictment charges conspiracy to do an unlawful act. He says:

> "* * * not for doing a lawful act by unlawful means, and therefore does not contain, and does not require, allegations to the effect that the defrauding of the United States was to be accomplished by deceit, misrepresentation, or concealment. If the indictment were based upon actual fraud by deception or concealment, it would, of course, be essential to allege this as a part of the conspiracy or plan, or of the means whereby the fraud was to be accomplished. Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419."

With reference to the overt acts the opinion states:

> "Confusion seems to have arisen from the fact that the overt acts are not alleged consistently with the object of the conspiracy as defined by the indictment. The overt acts seem to be alleged upon the theory of defrauding the United States by a scheme which comprehended deception, or illicit manufacture, or concealment. The result is that we have allegations of some 49 overt acts, most of which are framed on the theory of a conspiracy to defraud by deception or concealment, though no such conspiracy is charged in the indictment."

The instant indictment charges conspiracy to do an unlawful act or acts and "most of the overt acts are framed on the theory of a conspiracy to defraud by "deception and concealment, though no such conspiracy is charged."

Judge Brown continues:

> "As was held by the Supreme Court in a recent case, Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705, February 23, 1915, the plan of the conspiracy must be found in the clause of the indictment which sets it forth. It cannot be enlarged by the overt acts alleged. Even if it could be so enlarged, the allegations of overt acts are entirely too uncertain to enable us to read this indictment as for a conspiracy any part of which was deceit or concealment, or which involved, directly or indirectly, the unlawful procurement of materials, or unlawful or covert manufacture."

Applying this rule, the overt acts in the instant indictment cannot be used to enlarge the "conspiracy found in the clause of the indictment which sets it forth," and even if it could be enlarged the allegations of the overt acts being in precisely the same form as those in the Tillingham indictment do not "enable us (this court) to read this indictment as a conspiracy any part of which was deceit or concealment, or which involved, directly or indirectly, the unlawful purchasing, transportation or storage of rubber tires or tubes.

Next Judge Brown clarifies his meaning in stating, "the allegations of the overt acts are entirely too uncertain," etc.

The opinion reads:

> "While it is possible that what are alleged as overt acts might be such as to a conspiracy of a different character, they are not in train or in causal connection with the unlawful object of the conspiracy here alleged.

> "As the object of the conspiracy, as expressly alleged, was to defraud the United States at Providence by means of removing from the factory at Providence oleomargarine upon which the tax had not been paid, anything which merely effects the object of manufacturing the taxable commodity cannot be regarded as an act to effect the object of this conspiracy."

Concerning the same matter of the uncertainty of the allegations of the overt acts, Judge Brown also states:

> "The object defined as the purpose of a criminal plot, and not some other undefined object, must be looked to in determining whether an alleged overt act is in fact an act to effect it. The purchase of palm oil, its shipment, payment for it, etc., may be acts to effect the object of manufacturing colored oelomargarine; but they cannot possibly effect the removal of that oleomargarine without the payment of the tax, unless by some connection which does not appear and which is not inferrable from what is alleged. These are, for all that appears, nonculpable acts, from which no intent to defraud can be inferred, and which cannot support a finding of probable cause."

It is equally true in the instant case that although the isolated acts which are alleged as the overt act in the indictment are "not in train or in causal connection with the unlawful object of the conspiracy here alleged" and that since it does not appear in the indictment (or even in the evidence) from what is alleged or proved that "some connection" exists, "such acts are for all that appears" these "nonculpable acts, from which no intent to defraud can be inferred," these acts in the instant case are the perfectly lawful purchase of tires and tubes by

certain of the defendants, the transportation and storage of the same, all of which acts were equally lawful, failure to inform the O.P.A. of the whereabouts of the articles (even if deception had been used), which is not a violation of any directive or regulation and is therefore innocent; of precisely the same innocent type of the acts of which Judge Brown said they could not possibly effect the object of the conspiracy" or "being in furtherance of the unlawful object of the conspiracy," to-wit, to violate in some unspecified way, one or more of the directives and regulations named in the indictment.

The opinion in the *Tillingham* case adds the following clinching and conclusive statement whose pertinency to the instant case is obvious and unavoidable:

> "The purchase of materials which, like palm oil, may be lawfully used in the manufacture of a lawful taxable product, are merely steps in the creation of a taxable product, and are preliminary to the creation of an obligation to pay money. This is the creation of the condition upon which it may become possible to defraud the United States; but this is sharply separable from the defrauding which is contemplated after the obligation shall arise.
>
> "A tradesman may be defrauded in the creation of a debt to him, since he simultaneously parts with the consideration, and every step whereby the debt is created is in furtherance of the fraud. The United States cannot be defrauded by the production of a taxable commodity, since it parts with no consideration. There is no similarity in the cases.
>
> "Unlawful manufacture, or moonshining, may be a step toward the accomplishing of fraud; but lawful manufacture, even if secret, as many manufacturers

> are, is not a step towards the deprivation of the United States of sums of money.
>
> "Even if we assume a plan which involves from the outset a scheme of voluntarily creating a debt to the United States for which it surrenders nothing by way of consideration, and a deprivation of the United States of that debt when it shall be created, no innocent step toward the creation of a new right in the United States to receive sums of money should be regarded as an act 'to effect the object' of depriving the United States of that money."

So in this case the lawful purchase by certain of the defendants of rubber tires and tubes and the transportation and storage of them, EVEN IF SECRET, "is not a step" toward depriving or obstructing the United States in the exercise of its regulatory power over THE DISPOSITION OF THE TIRES AND TUBES.

The purchases, transportations and storage, "EVEN IF SECRET" having been lawful and innocent were each and all acts and steps toward the creation of a 'new right' in the United States, to-wit, the right *to regulate the disposition of these articles*, and such overt acts cannot be regarded as acts " 'to effect the object' of depriving" the United States of the regulatory right.

To reason otherwise defies logic which fact the *Tillingham v. Richards* opinion demonstrates.

However, logic and the weight of the decisions which have been discussed does not comprehend all of the authority which compels the conclusions which said decisions reached and announced.

A contrary theory or holding would be at war with other settled principles of criminal, such as:

1. The general rule that circumstantial evidence, to support a conviction, must be such that the conclusion drawn therefrom, excludes every reasonable hypothesis other than that of guilt applies to the offence of criminal conspiracy.

Beeckam v. U. S., 96 F. (2d) 15;
Copeland v. U. S., 90 F. (2d) 78;
Kassin v. U. S., 87 F. (2d) 183;
Gerson v. U. S., 25 F. (2d) 49;
De Luca v. U. S., 298 Fed. 412.

2. No conviction can be had or will be sustained on appeal when the evidence is as consistent with innocence as with guilt, and the Appellate Court will review the evidence to determine that question.

Dahly v. U. S., 50 F. (2d) 37 (8th Cir.);
Preightel v. U. S., 49 F. (2d) 235 (8th Cir.);
Wright v. U. S., 227 Fed. 885 (8th Cir.);
Vernon v. U. S., 146 Fed. 121 (8th Cir.);
Sykes v. U. S., 204 Fed. 909 (8th Cir);
Ayala v U S, 268 Fed 296 (1st Cir);
Gerson v U. S., 25 Fed. (2d) 49 (2d Cir.);
McGuinniss v. U. S., 256 Fed. 621 (2nd Cir.);
Ridenour v. U. S., 14 F. (2d) 8288 (3rd Cir.);
Yusem v. U. S., 8 F. (2d) 6 (3rd Cir.);
Garst v. U. S., 180 Fed. 339 (4th Cir.);
La Rosa v. U. S., 15 F. (2d) 479 (4th Cir.);
Sherman v. U. S., 268 Fed. 517 (5th Cir.);

Jelke v. U. S., 255 Fed. 264 (7th Cir.);
Ferris v. U. S., 40 F. (2d) 837 (9th Cir.);
Sugarman v. U. S., 35 F. (2d) 663;
Stubbs v. U. S., 249 Fed. 571 (9th Cir.);
Peterson v. U. S., 274 Fed. 929 (9th Cir.).

3. Proof of association between the alleged conspirator is not substantial evidence of the fact of conspiracy.

People v. Yant, 26 Cal. App. (2d) 725;
People v. Weber, 7 Cal. App. (2d) 620 (12 C. J. p. 639, note 52; 15 C. J. S. p. 1151, note 81, citing cases).

4. Where the evidence is as consistent with innocence as with guilt and the evidence of an essential element is circumstantial, the accused is entitled to a directed verdict.

De Luca v. U. S., 298 Fed. 412.

In the case last named, De Luca and one Pandolfo were charged with conspiracy to violate the Prohibition law. Sixteen overt acts were set forth. They included acts far more potentially indicative of guilt than any to be found in the instant indictment, such as, the accused occupied the same house, that is, Pandolfo occupied as his home a portion of the house above the basement where a great quantity of whiskey and other incriminating articles were found. Pandolfo had a desk in De Luca's office; the two men were associated closely in certain incidents at about the time of De Luca's arrest, and Pandolfo agreed with arresting officers to, and he did, bring De Luca to the Commissioner's office.

However the court considered all of the evidence bearing on the issue and concluded:

> "The affirmative charge requested was, if the jury believed the evidence, they must find the defendant Pandolfo not guilty. The rule of law, where the government relies upon circumstantial evidence alone for conviction of a defendant, is that the circumstances proven must not only point to the defendant's guilt, but must be inconsistent with his innocence. As otherwise stated, the circumstances proven must be such as to admit of no other reasonable hypothesis or explanation than the guilt of the accused. Can it be said that the circumstances proven in this case are inconsistent with the innocence of Pandolfo? We think not. Every circumstance proven in this case is perfectly consistent with innocence, and the request for the affirmative charge should have been granted."

Perhaps the most outstanding of the cases in which the reviewing court has examined the evidence, circumstance by circumstance, analysing each one, and determined for itself, giving the accused the benefit of any doubt, that the evidence was as consistent with innocence as with guilt, and thereupon reversed the conviction in *Dahly v. U. S.*, 50 F. (2d) 37. However, the same procedure has been followed in nearly all of the cases listed under proposition "2," *supra*, including those in the 9th Circuit, of which the *Ferris v. U. S.* (40 F. (2d) 837) opinion squarely recognized it to be the duty of an Appellate Court to do so.

Since, as declared in *Haywood v. United States*, 278 Fed. 795, "criminality cannot be proved by proving innocence," it seems unthinkable that any court could not hold that where, as in this case, each and every overt act was admit-

tedly lawful and innocent, it could be a matter of doubt that the circumstances proved are at least as consistent with innocence as with guilt.

This conclusion is surely rendered inescapable since, looking to the entire record, only one unlawful transaction is to be found, and it was participated in by only one of the alleged conspirators.

Appellant asserts, and feels assured that this statement will not be questioned that no other transaction except that in which the witness Leo Isenhower testified that he, a mere laundryman, "sometime in 1942," bought new tires from Mr. Rose, no act or transaction of an unlawful character was proved by the prosecution.

This Isenhower sale was not among the ten overt acts alleged in theindictment and neither the conspiracy nor the participation therein of other alleged conspirators could be established by this act in which they were not shown to have had any part or to have had any knowledge.

Isenhower testified:

> "* * * as to the other defendants in this case * * * I have never seen any of them before" [R. pp. 283, 284.]

Nowhere in his testimony did Isenhower mention any of the other defendants. [R. pp. 276-284.]

The overt acts set forth in the indictment were proved, without substantial additions, as laid. The court will take judicial notice of the regulations under which as duly licensed retail dealers in rubber tires and tubes the defendants had a right to purchase and transport such articles from other like dealers, both buyers and sellers having *bona fide* places of business. (Citing cases.)

The following is the substance of the prosecution's proof in respect to the overt acts as laid in the indictment:

Overt Act "(a)", is the same transaction as overt act "(h)". Both rest principally on the testimony of Mr. and Mrs. Humbert. Mr. Humbert swore that Mr. Rose was the only defendant who hired these trucks from me. "* * * I had no business transactions with the other defendants in this case. Not a bit, no." [R. p. 203.]

Mrs. Humbert testified that before this trip Rose said to two other men, "we should not make the same mistake in loading both vans at the same time." [R. p. 206.] Mrs. Humbert, at first said that Brown and Vitagliano were the other two men [R. p. 206] but on cross-examination stated that she might be mistaken "on that one," referring to Vitagliano. [R. p. 207.]

Overt act "(b)", was testified to by Mike Kreling. He said that in July, 1942, he had a service station at 1516 South Main; that he sold tires and accessories and had on hand certain 48 new tires and 128 or 130 tubes which he sold to Rose [R. p. 159]; that Rose signed the invoice and the OPA checked his books. [R. p. 160.]

Overt Act "(c)", was related by the witness Douglas F. Scott. He said that he was trust officer for the Bank of America in August, 1942; that Rose rented the 613 North Virgil premises from the bank; that Rose said he wanted to store some furniture and equipment, and that it was not heavy equipment. [R. p. 168.]

Overt Act "(d)". Sam Kelber testified that for eight years he was in business in Ontario, California, selling

primarily tires [R. p. 175]; that he sold the new tires and tubes to Rose who paid him $100 cash deposit; that Rose had a retail sales license to deal in new tires and tubes [R. p. 180]; that he contacted the OPA and was told the sale was legal; that Weinstein arranged for him to meet Rose [R. p. 182]; that when Rose moved the tires from Kelher's premises and Weinstein was present, Vitagliano was there but did not help in any way. [R. p. 182.]

Overt Act "(e)". Ruben Slavett testified that he was in business in Pasadena at 1850 East Colorado street and in August, 1942 Weinstein said he might get a buyer for him, Slavett [R. p. 208]; that Weinstein brought Rose and Slavett together and Slavett and Rose negotiated [R. p. 209]; the deal was finished and Rose paid a deposit of $200; Slavett was not on hand when Rose came by appointment to take the merchandise [R. p. 210]; and Rose called the deal off. Later they again negotiated and Rose bought the merchandise [R. p. 213]; Rose signed the invoices [R. p. 214]; Slavett followed the directions given by the OPA and when Rose took delivery of the new tires and tubes, Vitagliano and Weinstein were present; there were 212 new tires and 798 new tubes which were sold to Rose. [R. p. 216.]

C. A. Humbert testified that he was in the moving and storage business under the name of Bay Cities Express and Transfer; that he arranged with Rose to move some automobile accessories from Ontario, California, and he went there with two vans [R. p. 192]; that Humbert gave Rose the paid bills for services and Rose told him

to put down "auto accessories", which Humbert did. [R. p. 196.]

Overt Act "(f)". Sam Parsner testified that he sold Mac R. Brown some tires in September, 1942; that Vitagliano was with him; Parsner sold Brown 38 tires, all he had. Parsner was then in the tire business at 524 West Pico. Parsner had no business with Rose or anyone but Brown; Vitagliano helped load the truck; Parsner found that Brown had a station and the tires were delivered in broad daylight. [R. p. 226.]

Overt Act "(g)". Jack Foster, an investigator of the OPA, testified that in the latter part of July, 1942, he questioned Rose as to what he had done with the tires he purchased from Kreling; he told me he had them but that he would not let me see them until the first of the month; Foster said he could not wait that long; Rose said "I guess you better see my attorney"; Foster asked, "Does he have the invoices or anything showing what happened to the tires," and Rose said, "He should have by the time you talk with him," and gave attorney Benjamin Goodman's name and address. [R. p. 197.]

Overt Act "(h)". The witness Humbert testified that on September 29th, 1942, he moved tires for Rose from the corner of Wabash and Thornton, using two trucks [R. p. 197], to a place on Sunset boulevard [R. p. 198]; and one truck went to the Washington Van & Storage Company. [R. p. 199].

Humbert said that he put on his bill "auto accessories" because Rose asked him to put it that way on the first trip. [R. p. 200.]

Humbert said that on the trip to Ontario, Rose told him to cover the vans all good for fear of hijacking, and that the transaction was legal; the second trip to Pasadena was in broad daylight and on the third to Brooks Randall Company it was getting dark when they were unloading. [R. p. 203.] Humbert had no business transactions with the other defendants, and he told the OPA officer Foster about transporting the tires from Ontario to Virgil. [R. p. 204.]

Overt Act "(i)".

Overt Act "(j)". Government witness Henry Doyle testified that in September, 1942, he was manager of "The Smiling Irishman"; he said "We sell used automobiles;" he testified that Rose came in and asked if he, Doyle, wanted to buy new tires; Doyle said "No"; Rose left his card [R. p. 185]; Doyle did not sell tires but he had a retail sales permit. [R. p. 186.]

In view of the admissions which were made by OPA agents as witnesses, it hardly seems probable that the Government will dispute appellants' claim that the overt acts were all lawful and innocent.

William Fitzer, an investigator for the OPA testified at length concerning the purchase of tires from Mr. Novis-off by Taplin and the transportation of them from place to place until they were unloaded at the address on City Terrace. [R. pp. 140-145.]

On cross-examination he said,

> "It was legitimate at that time, for a retailer to purchase new tires and tubes and transport them to his place of business under certain circumstances."

He said he had found that Taplin was the purchaser and the holder of a retail sales license. [R. p. 146.]

He said that up to June 1, 1942 he did not find any violation of the rules or regulations of the OPA. [R. p. 148.] This included the last unloading. [R. p. 147.]

Jack Foster, another investigator for the OPA who had worked with Fitzer testified substantially to the same effect. [R. p. 136.]

He testified that Mac R. Brown purchased the tires and tubes from Taplin and that Brown was an "authorized retail dealer" and had a legitimate place of business. [R. p. 156.]

John Dundas, a lawyer, and chief investigator of the OPA, concurred in the testimony of the others, except that he mentioned a discrepancy of "these few tires," for whose disappearance Taplin had been unable to account. [R. p. 165.]

Since these transactions were lawful it follows that each of the other purchases and transportation charged as overt acts were also lawful because each of the defendants was a holder of retail dealers' sales license and operated one or more *bona fide* places of business, and in each instance the purchase or sale was with someone similarly situated.

The Court Should Have Granted the Motions to Strike Irrelevant and Incompetent Evidence.

The District Court should have sustained the motions to strike the evidence made by Attorney Goodman. These motions were contained on pages 350 to 356.

The motions to strike on the ground that no *corpus delicti* had been proved and no contract or agreement or conspiracy established or tied in with the defendants should have been granted instead of denied. [R. 351.]

Also, the motion to strike the testimony of Mr. Foster made on behalf of both defendants should have been granted.

The motions to strike the testimony of the different witnesses on the grounds that they had been in no way connected up with defendants Rose and Vitagliano should have been granted, as this testimony had not been connected up in any way.

The testimony of the witnesses John Dundas and Mr. Foster, investigators for the Office of Price Administration, was hearsay, irrelevant and incompetent, and the motions to strike should have been granted.

Commonwealth v. Debussey, 49 Pa. Super. 371;

Commonwealth v. Shobert, 49 Pa. Super. 371;

Commonwealth v. Sweeney, 49 Pa. Super. 370;

Commonwealth v. Lynch, 49 Pa. Super. 370;

Commonwealth v. Duffy, 49 Pa. Super. 344.

See also:

Fain v. U. S., 209 Fed. 525;

Tellingham v. Richards, 225, Fed. 226.

VII.

Title III of the Second War Powers Act as Amended March 27th, 1942, Is Too Vague, Indefinite and Uncertain to Form a Standard of Guilt. It Therefore Violates the Fifth Amendment to the Constitution of the United States.

The only provision in the Act which contains a penal provision is subdivision (5) as follows:

> "Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both."

The subsections of the Act to which this penal provision refers are as follows: (a) (1) relates to the negotiation of contracts for the acquisition of parts, etc., for navy vessels or aircraft and delivery of materials and refers to the negotiation of contracts for the acquisition of these materials for such navy and army contracts. Subdivision (2) relates to delivery of materials to which priorities may be assigned for such materials.

Subdivision (3) relates to obtaining information, keeping reports and records and making inspection of books by the President.

Subdivision (4) authorizes the President to administer oaths and affirmations, and require by subpoena the attendance of witnesses.

Subdivision (5) is the provision we have quoted.

Subdivision (6) relates to the jurisdiction of the District Court and courts of the United States and Territories.

Subdivision (7) relates to exemption from damages or penalties from defaults on contracts.

Subdivision (8) relates to the power of the President to exercise the power of the President or authority conferred on him through other departments or agencies.

Nowhere in this section is there an ascertainable standard of conduct.

Due process of law guaranteed by the Fifth Amendment of the Constitution of the United States provides that a statute must prescribe the rules of conduct so clearly that men of common understanding may know what is intended.

Pierce v. United States, 314 U. S. 306, 86 L. Ed. 226;

Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;

United States v. Elcone, 255 U. S. 89, 65 L. Ed. 520;

Connally v. General Construction Co., 269 U. S. 385, 391, 70 L. Ed. 322, 328;

United States v. Reese, 92 U. S. 214, 223, 23 L. Ed. 563, 565;

Czarra v. Medical Supers., 25 D. C. 443, 458;

Stromberg v. California, 283 U. S. 350, 368, 75 L. Ed. 1117, 1122, 51 S. Ct. 532, 73 A. L. R. 1484;

Lovell v. Griffin, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666;

Connally v. General Constr. Co., 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126;

United States v. Ballard, 12 Fed. Supp. 321.

VIII.

The District Court Erred in Denying Defendants' Motion for Arrest of Judgment.

A.

The District Court erred in failing to grant the motion in arrest of judgment. (A) The indictment itself was so defective for each of the grounds set forth in the demurrer that the court should have granted the motion in arrest of judgment.

B.

The Court erred in failing to arrest the judgment where it was shown that there was an illegal seizure of evidence in this case. Officer Fred H. Doane, a city police officer [R. 242], was called by an investigator of the United States and the O.P.A. and another gentleman. [R. 243.] Foster told Doane where the warehouse was and the tires were stored. The place was located. Doane did not have a search warrant. Foster did not tell Doane that if a Federal officer broke in they would not be able to get the evidence and that they would have to have a state officer go in. Doane looked into the window and saw tires there. Doane and D. J. Hamilton, another police officer, then placed Rose under arrest, took the keys to this building out of Rose's possession and went into the warehouse and took out a number of tires.

Thereupon the tires were rolled into the courtroom and placed before the jury box. [R. 248.] At this point in the case Mr. Goodman objected to the tires being rolled into the courtroom on the grounds that they were incom-

petent, irrelevant and immaterial and were illegally obtained and were being rolled before the jury's eyes for the purpose of creating prejudice. Over the objections of the defendants the tires were admitted in evidence and the list of tires was marked as Exhibit No. 26. The Court should have sustained the objection to the evidence thus illegally obtained by state officers operating in collaboration with the Federal officers.

McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819;

Gouled v. U. S., 255 U. S. 298, 65 L. Ed. 647;

Amos v. United States, 255 U. S. 313, 41 S. Ct. Rep. 266, 65 L. Ed. 654;

Byars v. U. S., 273 U. S. 28, 71 L. Ed. 520;

Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374;

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319;

Anderson v. United States, 87 L. Ed. 829.

None of the testimony regarding the tires was admissible in evidence. It was not shown to have been material in any way to the charges in the indictment, none of the tires were connected up in any way with any transaction in violation of any statute or any rule or regulation. Defendant Rose had a right to have the tires, he was a dealer, and it was not charged that he was illegally in possession of them.

C.

The District Court should have granted the motion in arrest of judgment for prejudicial error apparent on the face of the record and because the record failed to show facts essential to the verdict.

Blitz v. U. S., 153 U. S. 308, 38 L. ed. 725;
U. S. v. Goodwin, 20 Fed. 237;
Clement v. U. S., 149 Fed. 305;
Morris v. U. S., 168 Fed. 682;
Kellerman v. U. S., 295 Fed. 796;
U. S. v. Gibson, 31 F. (2d) 19;
Banta v. U. S., 12 Fed. 765.

D.

The motion in arrest of judgment should have been granted as it appears that the indictment fails to charge a public offense.

Blitz v. U. S., 153 U. S. 308;
U. S. v. Simmons, 96 U. S. 361, 24 L. ed. 819;
Kellerman v. U. S., 295 Fed. 796;
McKenna v. U. S., 127 Fed. 88;
U. S. v. Ford, 34 Fed. 26;
U. S. v. McGuire, 64 F. (2d) 485.

E.

The indictment pleaded essential elements of the charge attempted to be made in the generic language of the statute, for which a motion in arrest of judgment will be granted.

Blitz v. U. S., 153 U. S. 308;
McKenna v. U. S., 127 U. S. 88;
U. S. v. Ford, 34 Fed. 26.

It has been shown that the instant indictment fails to charge any offense; and more specifically, that it fails to charge any offense under the statute, directives and regulations under which it purports to be drawn.

It has been pointed out that said indictment is wholly insufficient and a nullity because it fails to inform the accused of the nature of the charge; "it fails to identify the offense attempted to be made; and it describes the offense in the generic language of a generically worded statute or governmental mandate, only;"

Decisions have been produced which hold that such an indictment violates the fifth and sixth amendments to the Federal Constitution and is thereupon void.

It has been shown that the deficiencies in the instant indictment are substantial and jurisdictional.

Further authority is afforded for the proposition that the insufficiency of the instant indictment is jurisdictional by decisions holding that discharge on *habeas corpus* will be ordered to one held under such an indictment.

Wherefore appellants pray for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE,
619 Bartlett Building, Los Angeles 14,
BENJAMIN J. GOODMAN,
1010 Wm. Fox Building, Los Angeles 14,
Attorneys for Appellants.

SUPPLEMENT.

The following is a summary of the testimony in support of the motion for a directed verdict on account of insufficiency of the evidence:

HENRY NOVISOFF

testified as follows: My name is Henry Novisoff.

Mr. Norcop: Before I interrogate Mr. Novisoff, under the authority of the Federal Register Act, 1940 Statutes, 500, I now ask to have marked for identification 11 booklets that are the publications in the Federal Register, of the matters mentioned in the first 12 counts of the indictment.

The first 12 paragraphs.

Mr. Goodman: That is agreeable. [R. 126.]

My business in May, 1942, was automobile tires; retreading, new tires, at 1161 South Main, under the name of Perfect-Made Tire Company. I know the defendant Phil Taplin, have about six years, in May of last year, I telephoned him.

The Court: Let us have an understanding now, gentlemen, and it will save a lot of strain on your voice, and a lot of overruling of objections. May it be stipulated that the evidence introduced will be subject to a motion to strike unless it is connected, and that will apply to each defendant, and will be received under that understanding?

All counsel accept the stipulation. [R. 127.]

I called him up and asked him if he was in the market for two retreading molds, and he said, "At the present time I am not, but I am in the market for new tires and new tubes." The next day, or two days later, I don't remember the day exactly, he came and showed me the

rationing regulation where a retail dealer can sell to another retail dealer without a certificate. I called D'Orr's secretary, whose name is Mr. Johnson, and asked him if they could be sold to another dealer, tires and tubes, and he said, "If he has a resale number and he is a legitimate tire dealer you absolutely can sell them, but to play safe," he said that he should have a letter notarized that he is 50 per cent wholesale and 50 per cent retail, and by presenting to you a certificate of resale number and notarizing this paper you are absolutely playing safe to sell him those tires.

Then I saw Mr. Taplin at my place of business following that. I talked to him and explained that I had talked to Mr. Johnson, secretary to Mr. D'Orr. Mr. Sam Weinstein came with him. He was present when the talk occurred between Mr. Taplin and me. [R. 128.] We went upstairs and typed a letter to the best of our knowledge, and went across the street and notarized it; Phil Taplin signed it, and then gave me a deposit on that date, and Sunday they picked up the tires. He made a deposit of $150 in cash. The total price agreed upon for my new tires and tubes was $4,800.00. I was paid the balance with a certified check. The check was signed by Phil Taplin. As to when delivery should take place, he said "Saturday, that is my busy day; if you don't mind, I will take delivery Sunday." That was convenient to us, because we are not open on Sunday, so he sent Mr. Weinstein for the tires. It was in the morning between 9:00 and 10:00 o'clock. I was there. The vehicles brought to load the tires in were closed trucks. As to who was driving those vehicles, I think Mr. Weinstein, and another fellow with him, but I don't recollect his name. [R. 129.]

The witness identified the document signed by Taplin. (The document referred to was received in evidence and marked Government's Exhibit No. 2.)

Mr. Norcop reads it: "I, Phil Taplin, located at 3412 Winter Street, Los Angeles, for the last five years, handling new, used and retread tires, have an average of 50% retail sales. My retail tax permit number is AA-6264.

Signed: Phil Taplin.

Witness: G. Metzer.

Subscribed and sworn to before me this 22nd day of May, 1942. Ada L. Sack, Notary Public in and for County of Los Angeles."

I gave Mr. Taplin or Mr. Weinstein an invoice for this merchandise. The witness identifies a "junk sheet" as the invoice. [R. 130.]

These other six or seven sheets are new tires and new tubes. This is an itemization of the summation that appears on the pink sheets. The next day or so he came to me, and he bought some more tires on the 25th; 14 tires. I said. "How the dickens can you sell tires? We have only sold a few tires. I don't understand how you can dispose of them." He pointed out to me that Weinstein was connected with a lot of physicians and surgeons who were entitled to new tires. Doctors, and that through him he sold these tires to doctors with certificates.

I have the record here. I have 14 tires sold to Taplin on this Monday.

Invoice and the supporting sheets received and marked Government's Exhibit No. 3.

The last invoice just referred to, of the sale on the 25th marked No. 4.

I sold my entire stock of new tires and tubes to Mr. [R. 131] Taplin, as represented by this $4800.00 invoice, except blemished tires they wouldn't buy.

Cross-Examination

By Mr. Goodman:

Upon the sale of these tires to Mr. Taplin, that constituted a complete liquidation of my stock of tires and tubes. I had left one U. S. Royal tire; I notified the Office of Price Administration, I asked them permission to sell them. The secretary to D'Orr knew all about it, because he gave permission to me, and how to write that letter. I did not notify the Office of Price Administration that I had sold all my new tires and tubes to Mr. Taplin. Some representative of the office of Price Administration subsequently called at my place of business and examined those records. I gave them a copy. I executed the invoice in duplicate, in accordance with the regulation of the OPA. I gave one to the OPA. [R. 132.] That was all in accordance with the rules and regulations of the Office of Price Administration as far as my knowledge.

The representative of the Office of the Price Administration called to examine the records of this alleged sale to Mr. Taplin a few days after the sale, did not call back again. I knew Mr. Taplin was a retailer. As to the facts that he related in the letter, so far as I knew, they are all true, he was a legitimate dealer.

These trucks that were used to transport these new tires on Sunday, had an open back. The tires were clearly visible to anyone who would observe the truck in the rear, but they had doors to close up. I couldn't recollect whether they were closed. It was during the daytime. I left after they received the tires. [R. 133.]

Cross-Examination

By Mr. Sullivan:

I know Mr. Paddock. He sells Murray tires, with the Star Tire & Rubber Company. He offered to buy tires from me. He had a customer to buy them, he says. He was figuring to buy all the tires. The next couple of days he came and wanted to buy, and I said, "The tires are sold to Phil Taplin, with permission of the OPA."

LOUIS C. KILGORE

testified as follows: My business is detective lieutenant, Los Angeles police department. I was on duty on the 26th of May, 1942. I went on at 4:00 o'clock in the afternoon. I went to [R. 134] *the* the vicinity of 12th and Stanford Streets here in Los Angeles that evening. Detective Leland Gerty went with me. At 12th and Stanford Streets I did not immediately on arriving see any persons now in the court room. I did see vehicles there, a Dodge closed panel truck, and an International closed panel truck of about 50 per cent larger capacity; both orange or yellow colored; backed in an open shed at the back of a service station. We were attached to the auto theft bureau, detective division.

After we arrived, we checked the license numbers. We checked the motor vehicle department, and found who the owners were.

We then rolled the smaller of the two trucks, the Dodge, out a couple of feet, and got behind it. We took a crowbar and pried up on the corner of the door. I think we [R. 135] jammed one of the locks off and got the door opened on the smaller truck, and found it was completely full of new automobile tires and tubes. We

then rolled the other one forward, and pried in the corner of the door and opened it enough so that we could see that it was full of tires and tubes. I saw Louis Vitagliano there. I had a conversation with him, just in front of the trucks, right after dark; I should say about 7:30. I asked him if he owned the tires, and he said he did. He said, along with five other people in partners with him, he owned the tires. He named Mr. Rose, and Mr. Taplin, as I remember. I have forgotten the names he mentioned, but I remember those two. He said he was going to sell the tires legally to people that had priority certificates; that everything was on the square and nothing illegal was going on, nor was it contemplated. I said, "That being the case, you have no objection if we notify the OPA that these tires are here?" He said, "Certainly not. They know they are here." Then Mr. Taplin came over, I believe, and joined him. [R. 136.]

I am not positive as to the identification of Taplin because it was dark, and the station very poorly lighted. Practically all of the conversation I had, or all of it, I had with Mr. Vitagliano.

Cross-Examination

By Mr. Angelillo:

The first time I saw Mr. Vitagliano was that first evening that I was there, the 26th of May, 1942. I think it was about 7:30. [R. 137.] It is not a fact that on that occasion he told me that "the tires belong to Phil Taplin." Louis says, "There are five other people in this with me and everything is on the up and up." [R. 138.]

My memory is that Taplin said he had reported the matter to the OPA, or had already done so.

After I had seen Mr. Taplin my conversation might have been with Mr. Taplin, not with Louis. I don't remember. [R. 139.]

WILLIAM S. FITZER

testified as follows:

Direct Examination

By Mr. Norcop:

I am investigator for the Office of Price Administration. I have been so engaged since the early part of December, 1941. In May, 1942, I went to the location at 12th and Stanford streets, with Mr. Jack Foster, also an investigator for the Office of Price Administration. I met Mr. Vitagliano there. Mr. Vitagliano told us at that time that the tires were owned by a friend of his, Mr. Phil Taplin, and that Mr. Phil Taplin had brought them from the Perfect-Made Tire Co. [R. 140.] Mr. Vitagliano produced sales invoices for those tires, showing that they had been sold by the Perfect-Made Tire Co. to—that is, they were billed to Mr. Taplin.

Mr. Taplin came there at that location that day. That was later in the morning, and we talked with him. Mr. Taplin said that he had purchased the tires. He stated that he had planned on buying up tires wherever he could, because he believed that they would be a good investment; that he would get better prices for them as they became more scarce. [R. 141.] He stated that Mr. Novisoff was going out of business and he was very anxious to get his stock moved out as rapidly as possible, and that he was anxious therefore to have them

come and get them even if it was on Sunday as an accommodation to him. Mr. Taplin stated that they had been unable to locate a warehouse that they felt was suitable for the storage of tires, but that after the experience of having the police officers break into the trucks they believed the thing to do would be to store them in a bonded warehouse such as Bekins.

We took the license numbers of those two trucks. [R. 142.]

Later we saw the trucks on East 4th street, across from the Bekins warehouse. They were driven there by Mr. Taplin and Mr. Vitagliano. I am not positive that they were driven there by those two gentlemen. They went into the offices of the warehouse, *where* there for a period of approximately five minutes and came out, got into a passenger car and drove away, leaving the trucks standing on the street. The trucks remained there on the street until about 4:30 or quarter to five on that same day, which was Monday, the last day that we had seen them. At that time they were driven to a public garage on 9th Place at Crocker. I think it is called Market Garage. They were parked in there at that time. They were driven there by Mr. Vitagliano and Mr. Taplin.

I don't remember whether Mr. Weinstein was there at the Market Garage or not. [R. 143.]

I was present at a conversation in the Office of the Price Administration where Mr. Taplin was present. Taplin again stated that he was holding them for speculation. Mr. Taplin stated at that time that they were owned by himself and Mr. Vitagliano and Mr. Weinstein, that they owned them equally. It was called to his attention that he had previously said that he had owned them

entirely and he said, "Well, that was not the case; that Mr. Vitagliano and Mr. Weinstein also owned them."

(Mr. Norcop offers a document in evidence.)

(The document referred to was marked as Government's Exhibit No. 6, and received in evidence.) [R. 144.]

While Mr. Taplin was in that office he was asked to give to the Office of Price *Admission* (*sic.* Administration) a letter setting forth that he would not dispose of the tires without first notifying the Office of Price Administration and state the information as to how or where they were disposed of. This letter was sent in by Mr. Taplin several days later.

I saw these tires or the vans later on out at the address on City Terrace on the east side. Mr. Taplin, Mr. Vitagliano and Mr. Weinstein were there unloading the tires. As they were completing the unloading, we went in and talked with them.

Cross-Examination

By Mr. Goodman:

I am not an attorney. On this occasion of May 25th, 1942, when I went out to Twelfth and Stanford streets [R. 145] I did not find any violations of any of the rules, regulations or directives of the Office of Price Administration at that time.

It was legitimate at that time, for a retailer to purchase new tires and tubes and transport them to his place of business under certain circumstances.

I subsequently investigated to determine where the tires had been purchased. I found that they had been

purchased from a dealer who had liquidated his stock. I also found that records were kept of that sale. Our office had been apprised and notified of that sale upon the investigation of those records. Subsequently I determined Mr. Taplin, who was the purchaser of the tires and tubes as disclosed by the invoices, was the holder of a retail sales license.

When I came out there at Twelfth and Stanford streets and found no violations, after I saw these two trucks moved from Twelfth and Stanford streets until [R. 146] they reached the point opposite Bekins Storage Company I did not notice or observe any violation of the rules and regulations up to that point. After the tires were moved from that place to the City Terrace district I did not observe any violations of the rules and regulations up to that point. When the tires were stored there at the building behind the service station I did not find any violation of any rules or regulations up to that point.

Subsequently I demanded that Mr. Taplin come into the Office of Price Administration. Mr. Weinstein was called into the office and I believe Mr. Vitagliano was, too, although I am not positive of that. The name of Mr. Benjamin Rose was never mentioned during any of the conversations that I had with either Mr. Taplin or Mr. Vitagliano or Mr. Taplin, as having any interest in these tires. The same is true of the names of Mr. Brown, Joseph Lieb and Phil Rezniche; none was ever mentioned at any time. [R. 147.]

Cross-Examination

By Mr. Sullivan:

Up to the time or the date on Government's Exhibit 6, June 1, 1942, I did not find any violations of the rules or regulations of the Office of Price Administration.

R. J. CAMPAU

testified as follows:

Direct Examination

By Mr. Norcop:

In May of last year I was working for Bekins Van & Storage at 25 East Fourth Street. At the end of that month I recall seeing two vans parked across the street from our building. If I recall correctly Mr. Vitagliano came to our office. [R. 148.] I had a conversation with him. He was with another man at the time. The substance of it was whether tires could be stored and taken out without certificates. I said, "No, sir; they couldn't be." They just walked out; said they wouldn't store them. I observed these trucks later on during the day. I did not see them depart.

Cross-Examination

By Mr. Angelillo:

I did not see any other person with them on that occasion that I now recognize.

It was stipulated that the person that he identified was the defendant Vitagliano.

GEORGE M. HOOD

testified as follows:

Direct Examination

By Mr. Norcop:

In May last year I was working for National [R. 149] U-Drive Truck Rental on Eighth and Alameda. They also had a location at 7026 South Central. They were always left out on the lot where everybody could see them. I have not produced rental records of the National

U-Drive rental company under date of May 24, 1942. I do not recall on that date having any transaction with any of the following persons. Either Mr. Mac R. Brown or Mr. Joseph Lieb or Mr. Benjamin Rose or Mr. Phil Taplin or Mr. Louis Vitagliano or Mr. Sam Weinstein. I was there the day that one of the trucks came back. I believe it was the Chevrolet truck. I don't know what the man's name was. It was a pick-up truck with black lettering on the side, triple "T". [R. 150.]

CLAUDE GARN

testified as follows:

Direct Examination

By Mr. Norcop:

I am a mileage rationing officer in the Office of Price Administration. I was employed by that governmental agency at the end of May of last year as an investigator. [R. 151.] At that time Mr. White and I made an inventory of the merchandise which was found in the building there. I don't believe the serial numbers were listed there. Mr. Fred White and I both signed it, and also, Mr. Taplin at that time was requested to sign it and he did so. [R. 152.] It is made up in Mr. Fred White's handwriting, in my presence. I checked the sizes and brand names. Mr. White recorded them on the paper, and we both signed the document.

The Court: It will be admitted as exhibit next in order, subject to a motion to strike as to the other defendants if it is not connected up.

Mr. Goodman: Objection that it is incompetent, irrelevant and immaterial, it does not prove or disprove any issue in the case.

The Court: Of course, the court can't tell at this time.

(The document referred to was received in evidence and marked Government's Exhibit No. 8.)

Cross-Examination

By Mr. Goodman:

Mr. Taplin was present at the time I made this inventory. Part of the time he assisted me, and part of the time he did not. He did it willingly. He co-operated with me. He did not conceal any of the tires or tubes there, to my knowledge. [R. 153.]

JACK FOSTER

testified as follows:

Direct Examination

By Mr. Norcop:

I am an investigator for the Office of Price Administration, enforcement department, have been since the first part of April, 1942. At the end of September of last year I had a meeting and a conversation with the defendant Phil Taplin at his place of business, 3441 Malabar Street, Los Angeles. There was also present Mr. Ernest, an investigator for the Office of Price Administration. I asked for an inventory that he had promised me and an invoice showing the sale of the tires that had been stored in 3200 City Terrace. He furnished me with an inventory and also a bill of sale showing that he had sold these tires to Mac R. Brown. [R. 154.]

That is the invoice.

By Mr. Sullivan: We have no objection to this going into evidence.

(Documents produced and marked Government's Exhibit 9 and received in evidence.)

I did not see Mr. Weinstein there at Mr. Taplin's. The previous day we had gone to his place of business, and Mr. Weinstein was there at that time. Just as we arrived there Mr. Weinstein came out of the place. We asked him if Mr. Taplin was in, and he replied that Taplin was out of town.

Prior to having this conversation with Mr. Taplin I had visited the 3200 City Terrace location. We found that the tires had all been removed from the City Terrace location.

Cross-Examination

By Mr. Goodman:

Before I became associated with the Office of [R. 155] Price Administration I was in business for myself; Service Station. I sold new tires and tubes.

I did not know any of these defendants. On that occasion that Mr. Taplin delivered to me the invoice, the bill of sale, which has been marked in evidence here as Government's Exhibit No. 9, upon delivery of these documents I did not find any violation of any of the rules, regulations or directives of the Office of Price Administration.

I also made an investigation to determine where these tires had originally come from, and I had found that they had been purchased by Mr. Taplin from Mr. Novisoff. Our office had been apprised of the fact of that sale.

I also found on my investigation that Mr. Mac Brown, who was the purchaser of these new tires and tubes from

Mr. Taplin, was an authorized retail dealer. I found that the number he gave as a licensed retailer, on the bill of sale or invoice was correct. He had a legitimate place of business located at 2824 Sunset boulevard. [R. 156.]

RALPH R. WALKER

testified as follows:

Direct Examination

By Mr. Norcop:

I am manager of the Arlington Van & Storage, have been since the last of July, 1942, at 3300 West Washington boulevard.

None of the persons in this court room came to me on or about the 29th of September and asked me whether they could rent storage space for automobile tires. There wasn't any one asked me that. There was a conversation over the telephone in the late afternoon; around 10:00 o'clock, they came in between 9:00 and 10:00. A Lilly Crescent van came in there. It backed in the warehouse. They opened up the doors, and there was a load of rubber. As to whether either of the men who brought the truck there were persons who are now present here in this court room, I don't see any of them. Someone came later on to remove them. [R. 157.] There were two men. I believe the sailor over there is one. I won't say for sure.

Mr. Goodman: I will stipulate that he is referring to Benjamin Rose, but he stated he wasn't sure he was the party who came there. They removed it that same night. They came in about, oh, 20 minutes after eleven. I do not know where the tires and tubes went to from there. The storage was at our 1904 Third Avenue address. They remained there about four days.

MIKE KRELING

testified as follows:

Direct Examination

By Mr. Norcop:

In July last year my business was my service station located at 1516 South Main. I have been in business there 14 months at that time. My business was gasoline, motor oil, tires, accessories. [R. 158.]

I had a conversation with Mr. Rose in July, 1942 at my station. Al Oliver, one of my employees was present. The first conversation, I have a date here, the 21st of July. Whether that was the first or not, I don't know. The substance of the conversation that I, my employees and Mr. Rose had was, I had 48 new tires and 128 or 130 new tubes that I wanted to sell. The only thing as I remember, we had given him the price of the tires and tubes, and he wanted to take it up with his partner, and would let us know in a few days. He came back again. I sold them to him. This was all of my tires and tubes, my new ones. I received $662.31 for them. Mr. Rose signed the invoice there at the time he took the tires.

(Document produced.)

That is the one I am referring to.

(The document referred to was marked as Government's Exhibit No. 10, and was received in evidence.) [R. 159.]

Possibly a week afterwards Mr. Rose came for them. He had an open truck.

Cross-Examination

By Mr. Goodman:

The Office of Price Administration came over and checked my books. At the time I did not know of any

rule, regulation or directive of the Office of Price Administration that I was violating. I had obtained information prior to that time that it was legal for me to make such a sale. The tires were picked up during the week, other than Sunday, and during the daytime, and in an open truck. [R. 160.]

By Mr. Goodman:

I knew Mr. Rose was operating a gasoline station. I knew what the location of it was, Olympic and Hill, if I remember correctly.

RALPH C. EARNEST,

testified as follows:

Direct Examination,

By Mr. Norcop:

I am with the B. F. Goodrich Company, in their conservation department. I have been connected with the tire industry about 15 years. Last year I was employed by the Office of Price Administration, from May 1st to November 1st, 1942.

In the course of my duties I met Mr. Phil Taplin. Mr. Foster was with me. I believe it was in the latter part of September, or the first of October, 1942. His place of business at that time was in the 3300 block on Malabar street. I went in and looked around. We asked him what had become of [R. 161] the new tires that were stored on City Terrace. He had sold them. That was the substance of what happened.

I have seen Mr. Taplin several times in his place of business. Mr. Foster was with me on the next occasions.

I do not recall any subsequent conversation with him about new tires or tubes.

I know Mr. Weinstein by sight. The only conversation I had with Mr. Weinstein was in company with Mr. Foster a day or two days prior to the time I met Mr. Taplin. Mr. Weinstein was in front. He later went into his place of business. We asked him about the whereabouts of Mr. Taplin and he informed us that Mr. Taplin was out of the city, and would return in a few days. I have talked with Mr. Vitagliano. [R. 162.]

When we talked to Mr. Vitagliano I was in company of Mr. Foster. Mr. Foster did all the talking. I was in the company of Mr. Foster, in connection with another case.

JOHN DUNDAS

testified as follows:

Direct Examination,

By Mr. Norcop:

I am with the Office of Price Administration, chief investigator, have been with the Office of Price Administration since May, '42. I had a conversation with Mr. Taplin, in the Office of Price Administration, about the end of May, 1942. It was about the day before the date of the letter which had been introduced in evidence here from Mr. Taplin to me, which was June 1st. There was present Investigator [R. 163] Fitzer, Foster and myself and Mr. Taplin. Mr. Taplin stated to me that he had acquired the tires from Novisoff, and he and this Vitagliano and Weinstein were equal partners in the ownership of the tires. I asked him to advise the Office of Price Administration before he disposed of any of these tires. He stated that he would advise us before he did so; that he intended to comply with the regulations entirely, and that if he did dispose of the tires in any way, or move them from their present location, that he

would advise us. It was subsequent to that that I received the letter which is in evidence.

There was a reference in our conversation to an inventory that had been taken of the tires at 3200 City Terrace, and Mr. Taplin stated in that regard that those were tires he had purchased from Mr. Novisoff. I said I was told that there was a shortage of this [R. 164] inventory as prepared by the investigators when compared with the bill of sale from Novisoff. His reply in substance was that he did not know what occurred to them.

Cross-Examination

By Mr. Sullivan:

I am a lawyer. I knew somewhat about the rules and regulations of the Office of Price Administration at that time; I knew that it was not required that Mr. Taplin give any letter to us at all. It was not demanded of him, however. It was received by me later. As to whether I told him at that time that it would be well for him to store his tires, I don't recall having said anything like that.

At the time I talked to Mr. Taplin in the Office of Price Administration, I did not find, other than the discrepancy I referred to in the inventory, any other violation of the rules and regulations or directives of the Office of Price Administration at that time. The discrepancy was a violation of the regulations in the sense that there was a failure to account for the tires that had been received by him in the bill of sale from Novisoff. [R. 165.]

He said, in effect, as I recall it now, that he did not know what had happened to these few tires that were missing between that time and the date when the inventory was made.

Mr. Taplin assured me, not once but several times, of his desire to handle these tires legitimately, and it was in that regard that the letter was suggested. [R. 166.] Any dealer could sell a tire if he had a certificate at that time, but he could not sell it to other dealers unless he had a certificate. At that time the regulations provided that a dealer might sell tires to another dealer, just for the purpose of going out of business.

He asked us what the wording of the letter should be and it may very well be we did suggest the wording, I don't remember. I did not tell him at that time that I suggested the letter that the law did not require him to do that.

DOUGLAS F. SCOTT

testified as follows:

I am a trust officer with the Bank of America. In August 1942 I was working at the Hollywood main office on Ivar and Hollywood boulevard. [R. 167.]

I know Mr. Benjamin Rose. He is the gentleman with the sailor's uniform. In the month of July I first talked with him at my office in the bank in Hollywood. He asked us whether we would rent to him the premises at 613 North Virgil. We eventually rented the place to him on a monthly basis, beginning on August the 1st, 1942, at $10.00 a month. He occupied the premises there from August the 1st to October the 1st. He said, as I remember, that his business was to purchase equipment and sell it.

Cross-Examination,

By Mr. Goodman:

We subsequently served notice on Mr. Rose to surrender possession of the premises when we leased that store. He did not tell me at the time what the type of equipment he was going to stor there was. He said he wanted to store some furniture and equipment.

Redirect Examination,

By Mr. Norcop:

I asked him whether it was heavy equipment. He said it was not. [R. 168.]

HORACE B. RANDALL,

testified as follows:

Direct Examination,

By Mr. Norcop:

My business is insurance and motor club at 5901 Sunset boulevard. In 1942 my business had control over a building there. I have a plat of my property there. The back part of the building, where the garage is was on the premises when we purchased it in 1935.

I met Mr. Benjamin Rose just once. I had a conversation with him with respect to this property. That was on or about September 29, 1942. The space he rented from me is the space in the upper lefthand corner on this plat. He paid rent from October 1 to October 31.

Mr. Norcop: I offer the plat in evidence.

Mr. Goodman: I object to it upon the ground that it is incompetent, irrelevant and immaterial.

The Court: What is the materiality of the exact location? [R. 169.]

The Court: I will admit it as exhibit next in order.

(The document referred to was received in evidence and marked Government's Exhibit No. 11.)

Cross-Examination,

By Mr. Goodman:

There was some view there from the street; you could see down two driveways between three signboards. There are windows in the upper part of the door in this structure which Mr. Rose rented. I couldn't say how many. He told me tires and batteries. [R. 170.]

TED W. MENDENHALL,

testified as follows:

I am a clerk with the Hertz truck lease. With the truck rentals, located at 718 East 3rd. I have produced a record of my company in response to a subpoena.

I rented trucks to Mr. Rose several times. He came in and got this truck at 10:37 P. M., October 1st, and returned it 2:14 P. M. October 2nd; 76 miles.

(The document referred to was received in evidence and marked Government's Exhibit No. 12.)

This record shows a Chevrolet refrigerator, it says, panel truck, all closed. I saw the truck when it was returned. When it was returned it had four tires in it.

(Witness examines tires.)

These are the same four that was in the truck when it came in. [R. 171.]

Mr. Norcop: We offer these four times into evidence at this time.

Mr. Sullivan: We object to their materiality.

Mr. Goodman: I would also like to ask the witness on *voir dire*.

The Court: Yes, I will permit it.

(By the witness):

I remember that Mr. Rose didn't bring the truck back. Mr. Rose took the truck out.

Mr. Goodman: We now object to the introduction of the tires on the ground it is incompetent, irrelevant and immaterial, and no foundation laid.

The Court: The objection is overruled. [R. 171.]

DON BEGLEY,

testified as follows:

Direct Examination

By Mr. Norcop:

I am with the same Herzt-U-Drive Company, at the same location as the previous witness. I saw these four tires—Exhibit No. 13 at my place of business. Someone called there and discussed with me having me turn over the tires to them. I have been looking and haven't recognized anyone here, as I remember. Then I turned the tires over to the government agency.

Cross-Examination

By Mr. Goodman:

I was not there when the truck was returned. I did not make an attempt to discover who owned the tires. I found that they [R. 173] were locked in my office at the time. I believe it was the FBI that was called on the thing. We didn't make any investigation.

Cross-Examination

By Mr. Sullivan:

The boy that did check it in called the FBI. That was all we had to do.

By Mr. Goodman:

(By the witness):

Someone called for those four tires after the truck came back and I spoke to him. We did not return them to the man who called for them because we had been told to hold them. If that man who called for the four tires [R. 174] that I speak about is in the courtroom, I don't recognize him.

SAM KELBER

testified as follows:

Direct Examination

By Mr. Norcop:

My present business is buying cattle in North Dakota. I was in business in Ontario, California. My business there was primarily tires.

I know Sam Weinstein. In the summer of 1942 I had a conversation with Mr. Weinstein at Desmond's, here in Los Angeles. There was another party with him.

(Stipulated that he is referring to Louis Vitagliano.)

My wife was with me. The substance of the conversation was that I had a lot of new tires; I had decided to liquidate my tire business. During the course of the conversation with Mr. Weinstein he told me [R. 175] he thought he could find a customer for me. He called me later by telephone. He had a customer, he

thought, and he made an appointment with me to come out to Ontario, to my place of business. He came out there with Mr. Rose. I think at that time there were just two of them that came to my place of business.

We discussed the price of the tires. We arrived at a rough figure of $4,400.

I heard from them again. They called me, and I made an appointment to meet them in Los Angeles. I met Mr. Weinstein down here, at a Shell service station. It was a station with a parking lot in conjunction with it, Tenth, Eleventh or Twelfth, and possibly Hill. I met Mr. Weinstein there alone. [R. 176.] We went to the bowling alley. We met Mr. Rose there. The three of us spoke a few words; the bulk of the conversation was carried on between Mr. Weinstein and Mr. Rose out of my hearing. It carried on about thirty minutes. Then we talked, and Mr. Rose said he could handle the tires, and gave me a hundred dollar deposit cash, and we made arrangements whereby he would come out on Sunday. That was Sunday, August 1st when they came out, at my home. They took delivery of the tires that day. They came in Mr. Weinstein's car, Mr. Rose and Mr. Weinstein, and Mr. Rose's brother, as I generally understood, and two trucks, two vans.

I do not know who was driving those vans. It was not any of the people I have described. I don't remember Mr. Weinstein helped load them or not. When my brother came in he helped. During the loading, a man and [R. 177] woman stopped by. They had a conversation with Mr. Rose. I did not hear it. I made out an invoice of the tires that I was selling. I had a conversation with Mr. Weinstein and Mr. Rose. Mr. Rose told me that he had a number of service stations.

(A yellow slip is produced.)

That is one of a triplicate copy out of the register we used. This reflects the sale on that date, August 1st. This at the botom is in Mr. Rose's handwriting, which reads: Ben Rose.

These five sheets that you are now handing me are tally sheets.

These bookkeeping or accounting appearing two sheets, was an inventory, made out of our new tires. My bookkeeper made that out. This other sheet you are now handing me is a tally . [R. 178.]

(The documents referred to were received in evidence and marked Government's Exhibit No. 14.]

Mr. Louis Vitagliano was there. He wasn't there all the time, though. He was there sitting in the front room.

Cross-Examination

By Mr. Goodman:

I had decided to liquidate my business and go to North Dakota prior to the time that I met Mr. Weinstein. I moved the new tires and new tubes up to my home. At the time Mr. Weinstein first contacted me, and subsequently, when Mr. Rose purchased the tires, the new tires and tubes were already at my home. I planned, if the tires were moved on Sunday to leave on Sunday, but not by train. I was very [R. 179] anxious that these tires be removed so my family could make the trip with me. I don't know if I suggested that they come here Sunday, or they suggested it, or both did. I know I wanted them out of there as soon as possible, so that we could go. That invoice was prepared on Sunday.

I sold the tires to Mr. Rose at cost, it was slightly above cost. I don't remember the exact percentage that we figured. There was a percentage figured above cost, because I remember at that time the Government allowed a raise.

Just prior to the sale to Mr. Rose I had a retail sales license, to deal in the sale of new tires and tubes, Before I made the sale to Mr. Rose I contacted the Office of Price Administration and I told them I was going to make the sale. The Office of Price Administration, Mr. Stevens, was trying to help me find the customer for them. He said if he could find a customer for me he would do so. [R. 180.]

I did not contact the Office of Price Administration again when I made the sale to Mr. Rose.

I did not know of any rule, regulating or directive of the Office of Price Administration that was being violated at the time the sale was made. I was told that it was a perfectly legal sale. I could sell to another tire dealer, but I couldn't sell to the consumer without a permit, or back up to a wholesaler.

Mr. Rose exhibited to me his seller's permit issued by the Board of Equalization of the State of California at Los Angeles. Mr. Rose gave me the number. He paid me the $100.00 deposit, brought out a cashier's check for $4,400.00, and we did a little figuring and there was another $75.00 which he paid me by personal check. [R. 181.]

Cross-Examination

By Mr. Angelillo:

On the first occasion that I met Mr. Vitagliano at Desmond's I did not have a conversation with him. He was not in on the conversation. Mr. Weinstein called me first and then he and Mr. Rose appeared at my place of business. Mr. Vitagliano did not in any wise help load the trucks or remove the tires. I didn't have any conversation with him. He excused himself to go downtown to get a cigar. [R. 182.] I remember that.

Cross-Examination

By Mr. Sullivan:

This meeting at Desmond's was not by prearrangement with Mr. Weinstein. I knew Mr. Weinstein before that. He told me that he was merely trying to do me a favor; in other words, find me a customer, and he did expect something out of it. He told me he wants some from me and he was going to try to get a commission from Rose. Mr. Weinstein did not pay me any money though, at all.

Redirect Examination

By Mr. Norcop:

I paid Mr. Weinstein some money.

He told me that Rose was not giving him anything [R. 183] and that he hadn't gotten any money from Rose yet; that I would give him I should give him out of sight of Rose, which I did.

MRS. STELLA KELBER

testified as follows:

Direct Examination

By Mr. Norcop:

I am the wife of Mr. Sam Kelber who was just on the witness stand. I was at my home when Mr. Rose purchased some tires. I had a part in the transaction that day. I saw there that Sunday while the tires and tubes were being loaded, the two drivers of the trucks and Mr. Rose and Mr. Weinstein, my husband, and this Floyd Mason [R. 184] and my brother-in-law and myself. And I think Louis was there. I am almost positive he was.

(Stipulated she referred to Louis Vitagliano.)

Mr. Rose and I had just a general conversation. He said he had four or five service stations and he was going to sell the tires to the service stations.

SAM KELBER,

recalled.

Recross-Examination

By Mr. Sullivan:

I paid to Mr. Sam Weinstein $50, no more.

BILL SOUKESIAN

testified as follows:

Direct Examination

By Mr. Norcop:

My business is radiator repairing and tire business located at 736 North Broadway. I am in business with my brother, Harry Soukesian. My brother and I have been in business [R. 185] there about 14 years. I know Mr. Weinstein. I first met him at our place of business

last year sometime, in 1942, a summer month, probably around September. Mr. Weinstein and I were alone. He asked me if we had anything to sell in the way of truck tires or anything; he was in the market to buy used tires; and I told him at the time we were not in the market to sell anything.

On a later occasion I told him I might sell some of my new tires to lower our stock.

I met Mac R. Brown after I had met Mr. Weinstein. He came with Mr. Weinstein. There was no one else present besides us three. I was not very interested because I had another prospect that I was discussing sales of the tires to. [R. 186.] On a later occasion Mr. Brown asked, I think, at what prices I might be interested in selling. I told him "cost—plus five per cent." He said he had a few gas stations that he needed merchandise for. I did sell to him. Mr. Brown, when I arranged to sell the tires to him, before I delivered them to him, said it would be very easy for him to dispose of them because he had so many different connections, such as these aircraft factories, where they needed tires and where they were able to get these certificates much easier.

I have the invoices that carry the date and complete transaction.

(Invoices produced.)

(The document referred to was received in evidence and marked Government's Exhibit No. 15.) [R. 187.]

Those are the invoices to which I have just adverted. This invoice is made out to "Rappan Service." That is his service station, he said, at the time, at 2824 Sunset boulevard. The invoices show the total price paid by Brown for all these tires; it is close to $5,800; the addi-

tion to all the amounts should sum up to around $5800. I had Mr. Brown sign every one of the invoices.

There was used in transporting the tires away from my station a Chevrolet truck. It is sort of a panel truck. It is all closed in.

Besides Mr. Brown and myself there were there on that date about two or three men.

As to why Mr. Brown signed twice on one of these pages, that was because he took some tires [R. 188] in his own personal car and then the truck came back and took the others. He took the "4-600-16, 6-250-16 Standard Firestone and 1-600-16 tubes" in his personal car, six tires and one tube.

About that part of the delivery he said he had a sale and that he needed it right away.

On the first day, first of all, I called up the OPA and made sure that it was all right for me to dispose of my tires, and they advised me that it was all right, just so I made three forms of invoices so they could refer back to them at any time that I wanted to, and as long as they gave me their permission I went ahead and sold to Brown.

Mr. Brown is the only defendant that I had anything to do with; and the only one that I know clearly in my mind that was there. These other men loaded the truck. [R. 189.]

I asked them what they were afraid of and Brown said they were afraid they might be hijacked.

Cross-Examination

By Mr. Goodman:

When I met Mr. Weinstein, as to my new tires and tubes, I was not exactly trying to find customers for them, that is, I was not very interested in it. I had one other

prospect besides Mr. Brown. His name was Reuben. [R. 190.]

I did not liquidate the complete stock. I had left about 100 tires. I have since sold them. The balance of the tires left were sold individually, two or three at a time, on certificates. I always carried a stock of new tires. I have bought new tires right along from the factory.

I contacted the office of Price Administration before I made a sale. They told me it was perfectly all right to sell to a tire dealer. Mr. Brown gave me his address. I went by and noticed his place, and noticed the name on the service station, so I figured it was a safe transaction. He also executed a certificate. He executed a card, with his signature on it, and his sales tax number on it. [R. 191.]

C. A. HUMBERT,

testified as follows:

My business is the moving and storage business at 4428 Melrose Avenue. I have been in business there approximately eight years. We do business under the name of Bay Cities Express & Transfer.

I know Benjamin Rose. I have known him since about the middle of last August. I had a conversation with him before that; in the middle of July. I walked outside, and met him outside. The conversation was about getting a couple of vans to move some accessories, automobile accessories. At that time the trip was to have been from Pasadena. He made a tentative arrangement for a man to come on Sunday. I saw Mr. Rose on August 2nd, 1942.

I went to Ontario. My wife went with me. [R. 192.] When I arrived at that place on 5th Street my two vans

were there. One was backed in the driveway, and one was sitting on the street. They were getting tires out of the garage and tallying them.

I can identify anybody in the court who was there, Mr. Rose, and Mr. Weinstein were the only two, and the truck drivers . There was also a young man that was up on the stand a while ago, and his wife, and my two drivers. That is all I know of. I had a conversation with Rose while I was there. I asked him what was going on, and he said it was all right. I was there, I imagine, five minutes, and I left for a short time, and came back again. I was there when the trucks had been loaded and left. One driver was Don Parmalee, and the other Sam Dawden. The vehicles of mine used that day was a GMC ton and a half covered van, and a Chevrolet ton and a half covered truck or van. My original van that I always had, did not have on the outside any labeling or name; we were repainting it, and it did not have any lettering yet. The other one was labeled Lilley Crescent Van & Storage. I followed the trucks into Los Angeles. Mr. Rose told me to meet him at the corner of Santa Monica [R. 193] and Virgil in Los Angeles. I saw him there. He had us drive down to 613 North Virgil, and drive in back, in the lot. Mr. Rose was there, and a young boy, I imagine about 18 years old. I don't know him. And the truck drivers. We pulled the trucks in. Then we decided to have lunch. We came back, and we backed each truck into the back door and rolled the tires off. That room that I put the tires in was not up to the street front. It was about one-third of the building. Both truckloads were unloaded into that room. The tires were all wrapped; some of them were loose, but they

were wrapped. The tubes were in boxes. The room in which the tires were put was all boarded up, sealed up; the windows were all boarded up. Mr. Rose told me if I needed any tires he would go down to the OPA for me and save me a lot of red tape.

The next business I had with Mr. Rose was on August 22nd. The only conversation I had with Mr. Rose concerning the trip, before I made it was just to meet him at that address. I made the trip myself. I took the same Chevrolet van, Lilley Crescent. The one that had on it Lilley Crescent Van & Stor- [R. 194] age. I went to 1850 East Colorado. There were quite a few people there. The only ones I remember were Mr. Rose and Mr. Weinstein. I would say about five or six people were there. We all formed a line, and rolled the tires to the truck, and loaded them up. I did not have any conversation with Mr. Weinstein out there. Mr. Rose told me to take them to the same place where I had taken the previous loads, and he would meet me there. That was 613 North Virgil. I did that. I was alone as the driver. When I got over to 613 North Virgil, Mr. Rose met me there, and we unloaded them. Inside of the warehouse—there weren't many tires there from the first load.

When I first brought the two loads in from Ontario, the room was I would say better than three-quarters full of tires. There were not other tires in there at the time I unloaded from Ontario. [R. 195.]

Around the floor of the room on that day, the 22nd, there was quite a pile of tire wrappings. I gave Mr. Rose an invoice. He signed my copy, and I gave him the paid bill. Referring to an invoice of the Bay Cities Express & Transfer 8-22-42—that's mine.

(The document referred to was received in evidence and marked Government's Exhibit No. 16.)

(Reading): Shipper, Rose. From 1850 East Colorado to Virgil and Clinton. Auto Accessories. Three hours at $4.00 an hour, $12.00. Van. My own name signed.

I was told to put down "Auto Accessories." Mr. Rose told me to put that down. With respect to the September 29th trip, it was some days before that, he came to [R. 196] the office. My conversation with him was just on releasing the vans for that particular trip. The trip was supposed to have been Friday. It was changed. I went on the 29th. I drove one of the vans myself, and another man drove my other van. Mr. Rose asked me to drive out to Evergreen, and turn left half a block and park and wait. The conversation occurred in my office. Besides myself and Mr. Rose, Max Cramer, the other driver, was present. No one else of the other defendants here in court was present.

I used two trucks labeled Lilley Crescent. One was a Ford and one a Chevrolet; both one and a half ton trucks. They were closed vans. We drove over to Evergreen and Brooklyn and parked there for about an hour. It was late in the evening; very late—5:00 or 5:30. We parked over on Evergreen about an hour, and finally a man driving a red pickup came over to the trucks, and we followed him. That man was the defendant Mr. Weinstein. We followed him, and went up to City Terrace, on the corner of Wabash and Thornton, to a service station and repair place. We backed one truck in at a time, and loaded them. [R. 197.]

As to whether anyone else assisted me in loading the tires—Mr. Weinstein, Mr. Rose, and there was somebody there. Nobody else I see in the courtroom was there that I can remember. Half the tires went on one truck, and half on the other.

The truck I had at the end, it was pretty well filled up. Tires were loaded in there. They were wrapped tires. I couldn't say whether there were any tubes. The truck was to go to the second driveway west of Brooks Randall on Sunset Boulevard, and turn in there and wait. [R. 198.]

The first truck, that Cramer was driving was to go to the Washington Van & Storage. I couldn't say who said that, or who gave that direction. After I got out to Brooks Randall Mr. Rose was already there. I backed the truck in, and unloaded it. Mr. Rose and myself was all there were there.

Exhibit 11 looks something like the location where I took this load of tires. There was not any tires in there that I could see. There was no light in the room. We just laid them, in about four or five piles, clear out to the door; almost to the door. It was quite dark when we got through, around 8:00 o'clock. Then I went back to my business. The other truck hadn't got in yet. I went home.

This invoice of the Bay Cities Transfer dated September 29, 1942, does not reflect the transaction. I had a conversation with Mr. Rose about this invoice. My wife was present. Mr. Rose wanted to know if the OPA had called up. I told him no. He wanted to know if they had asked me where the tires went to, and I told him if they asked me I would have to tell them, so he wanted [R.

199] to know if I would tell them he took the truck from my office. I said I had to put the destination on my bill, where it was, and where I took it. Finally we made up that bill there with Mr. Foster's permission. This did not reflect the destination where I took the merchandise. I made it at Mr. Rose's request.

(The document was offered in evidence.)

This pink carbon invoice dated September 29th is one of my invoices with respect to this transaction on September 29, 1942. This carbon was made at the same time as the original. This white invoice is the original of the pink one.

(The documents referred to were received in evidence and marked Government's Exhibit No. 18.)

With relation to the designation on that invoice of the character of the merchandise hauled—I put on "auto accessories." Mr. Rose asked me to do that the first trip, and as to the other trips I couldn't say. This relates to the truck load that was taken by Mr. Cramer and driven away from the City Terrace address previous to my going to Hollywood. They were both trips; both trucks. [R. 200.]

This white invoice from Bay Cities Express & Transfer, dated 8-2-42, is an invoice that bears on the first job —the Ontario job.

Mr. Norcop: We offer it in evidence.

Mr. Goodman: I object to it on the ground it is incompetent, irrelevant and immaterial.

(The document referred to was received in evidence and marked Government's Exhibit No. 19.)

Cross-Examination

By Mr. Angelillo:

As to the persons whom I saw at Ontario in connection with the loading or handling of the tires—the only two that I can identify were Mr. Weinstein and Mr. Rose. I do not recall seeing the defendant Mr. Vitagliano here before I came to this courtroom today. [R. 201.]

Further

Direct Examination

By Mr. Norcop:

When I was at Ontario, I was told to cover the vans all good for fear of hijacking on the way. Mr. Rose told me that.

Cross-Examination

By Mr. Goodman:

At the time that I first learned that I was going to transport tires for Mr. Rose and I had a conversation with him. He told me that all of the tires were registered with the Office of Price Administration. He told me that the tires were not stolen, and that it was a legal transaction.

On the occasion that I made the second trip or the second hauling for Mr. Rose to Pasadena, it is a fact that that was in broad daylight on Saturday. On that occasion, I knew before going to Pasadena that I was going to haul tires and tubes. The second time, I knew it was tires. I suppose I knew when I went out on the second trip, before I got to my destination, where I was to pick up the new tires and tubes, that I was going to pick up new tires and tubes. The third occasion was when I delivered them to Brooks Randall. [R. 202.]

On this third occasion, when I went out to the Brooks Randall Company, when I arrived at Brooks Randall, I did not say it was dark when I got there. It was dark when we got through unloading. By the time we got backed into the door it was just getting dark then. The rear of my trucks were covered with tarpaulin. They were not paneled. These tires were all inside completely covered up. Except the first occasion, we had furniture pads over the tires to hide them, under Mr. Rose's orders. The reason he gave me was that they might be hijacked. Mr. Rose was the only defendant who hired these trucks from me. He is the only one that paid me. I had no business transactions with the other defendants in this case. Not a bit; no.

I was contacted by a representative of the Office of Price Administration after these deliveries, and before the third delivery. When I made the third delivery, the one to Brooks Randall Company, I had already spoken to the representative of the Office of Price Administration. That was Mr. Foster. [R. 203.] I had told him on that occasion that I had transported tires for Mr. Rose from Ontario to a place on Virgil, 613. The first time he came out I didn't know he was going to make another delivery. I was told by Mr. Foster if I was asked to go ahead and make it. He told me to make it.

MRS. JOSEPHINE HUMBERT

testified as follows:

Direct Examination

By Mr. Norcop:

I am the wife of Mr. C. A. Humbert. I was working in my husband's business at 4428 Melrose Avenue in August 1942. I know Mr. Rose. At Ontario I saw Mr.

and Mrs. Kelber, and Mr. Rose. I couldn't place any of the others right now. I did not see Mr. Rose in my office again until the Friday before the 22nd of August. [R. 204.] I know that they came in on September 29th and wanted two vans. I was there then. The persons I refer to are Mr. Rose and the gentleman back there with the mustache. (Indicating Mr. Mac R. Brown.) And this man at the end of this table here. (Indicating Mr. Vitagliano.) In my presence, Mr. Rose and I can't remember who he talked to, but he said that they should not make the same mistake that they had previously made of loading both vans at the same time; that they should load one van at a time. [R. 205.]

Mr. Brown and Mr. Vitagliano were there.

I am positive that Mr. Vitagliano was present there on this September the 29th. At the time that this conversation that I spoke of in which Mr. Rose said, "We should not make the same mistake of loading both vans at the same time. Rose was talking to both Mr. Brown and Mr. Vitagliano. I was in the front office of my building there, sitting at the sewing machine. I couldn't say whether or not Mr. Vitagliano answered Mr. Rose, as I can't remember the voices, but I do remember Mr. Rose. I can't remember whether Mr. [R. 206] Brown answered Mr. Rose. I don't know whether they said anything.

Cross-Examination

By Mr. Angelillo:

The first occasion that I saw Mr. Vitagliano, so far as my knowledge is concerned, is the 29th of September. I did not see him at Ontario. I could be mistaken about that person's identification, but he does look like the man that was in the office that day. I may be mistaken on that

one. Not the other one. Mr. Vitagliano fits the description I just gave you. But I am not sure about it. Not positive. [R. 207.]

REUBEN SLAVETT

testified as follows:

Direct Examination

By Mr. Norcop:

My business is the tire business. Located in Pasadena, 1850 East Colorado Street. I know Mr. Weinstein. I first met Mr. Weinstein at a service station on Mission Road, the Three Jacks. That was during the month of August, 1942. I had a conversation with him then. While I was talking with the other fellow he came over and joined in the conversation. It came out that I had some new tires and tubes which I was interested in selling, and he mentioned to me that he possibly could get a buyer for me. [R. 208.] On a later occasion I met Mr. Weinstein down town in Los Angeles. We went out to get in touch with the man that later turned out to be Mr. Rose. We met Mr. Rose later on around the vicinity of Third and Vermont, in Los Angeles. The three of us had a discussion about the purchase of the tires. So Mr. Rose and Mr. Weinstein and myself were sitting in the car, and I told Mr. Rose that I wanted $3300 for the merchandise, and he offered me $3000, and I said "No, $3300 is the price." Then Mr. Rose and Mr. Weinstein got out of the car, and walked up the street. [R. 209.]

Mr. Rose still offered $3000. I figured I wanted to sell the merchandise; I did not want it on my hands. I said, "I will split the difference, and make it $3150." So Mr. Rose still insisted on $3000.

Then we left. Mr. Weinstein went with me and Mr. Rose went off by himself. Mr. Weinstein and I saw Mr. Rose later in the day at his gas station. The deal was finished there for $3150.00, and he gave me a deposit of $200 in the form of a personal check. The merchandise was supposed to be picked up Sunday morning, at my place of business. The time set was 8:00 o'clock in the morning. I got there late, at 8:30, and when I got there there was a note on the door, by Mr. Rose. I did not understand clearly about that. Anyway he had to be with the truck at a certain place, at a certain time, and therefore he had to leave before I got there. [R. 210.]

I told Mr. Weinstein what happened that morning. He did not seem to understand; neither did I. The next morning, I went down to see Rose. I had a conversation with him, and he told me the deal was all off. He did not want any part of the deal, as long as Mr. Weinstein was in it. Later I saw Mr. Weinstein and he told me that he had another prospective buyer. He told me he had another prospective buyer, and I met him, and we went to this place at 12th and Stanford, and there I was introduced to Mr. Vitagliano. A few minutes later another man approached, so Mr. Vitagliano introduced me to this fellow as the prospective buyer, and I spoke to him. [R. 211.]

I don't know what the name of the man was that I was introduced to. He is not in court so far as I know. I got a $50 deposit from the prospective buyer, and told him also I still had the check of Mr. Rose, and my receipt for the [R. 212] merchandise, and before the deal would be final I would have to give him the check back, and get my receipt back.

The prospective buyer told me his place of business was on San Fernando Road, in Glendale. That deal did not go through. After this deal was off, I went back to Mr. Rose, and told him that the other deal was off, and if he wants to he could have the deal. No one was with me when I went back to Rose. He accepted the deal. The deal was then $2900. He said he would take care of Mr. Weinstein for his commission, and I would realize $2900 out of it. He gave me a deposit. He had a cashier's check in his pocket for $2750 made out to me.

The time I saw Mr. Vitagliano again was when Mr. Rose came the next day to pick the merchandise up, to my place of business in Pasadena. All the merchandise was put in the truck, and the truck drove off, and I said to Mr. Rose "How about my other $150, I have got coming from the balance" which he did not give me yet. He told me to forget about [R. 213] it that I made enough money on the deal. I persisted in getting my $150, which I had coming.

Finally he settled for $75, and he said he may give me the other $75 sometime. So he gave me a check for $75.

These three sheets of invoices of the Dandy Tire Company, dated August 22, 1942, are the invoices that I made, representing the transaction I just described. I made out three individual copies. The copy I have, and I gave one to Mr. Rose, and this one to the investigators. Mr. Rose signed the invoices. The permit, retail sales number, was put on there in my presence. [R. 214.]

(The document referred to was received in evidence and marked Government's Exhibit No. 20.)

Mr. Rose after this transaction had been completed, mentioned to me if I knew anybody else that had new tires to sell to get in touch with him, and he would see to it that I got something out of it.

Cross-Examination

By Mr. Goodman:

I investigated to determine whether or not Mr. Rose was a legal retailer before I made the sale. I knew that he operated one or more stations in the City of Los Angeles where he had been selling new tires and tubes. He exhibited to me his retail sales license. The OPA office told me to make three copies of the invoices, and to be sure that the [R. 125] purchaser was a retailer and in business. The tires were delivered to Mr. Rose on a Saturday. It was around noon, maybe an hour before. Besides myself and Mr. Rose there was present Mr. Vitagliano, Mr. Weinstein, and the truck driver. I never saw Mr. Mac Brown there. I never had any contact with Mr. Mac Brown at all during this entire transaction. There were 212 new tires, and 798 new tubes.

My records were checked about February, the merchandise was checked by an OPA man. They have been examined. At that time I gave them a copy of the invoice. Upon the sale of these tires and tubes to Mr. Rose, that practically liquidated all my tires and tubes that I had at that time. [R. 216.]

Cross-Examination

By Mr. Angelillo:

I am acquainted with Mr. Soukesian, on North Broadway. I never tried to buy his stock. I tried to sell his stock for him. I was negotiating with Ben Rose only.

On the occasion that I met Mr. Vitagliano he was not to be the purchaser. All I know is that Mr. Weinstein and I went to 12th and Stanford, Mr. Vitagliano's place of business. There I was introduced to Mr. Vitagliano, who, in turn, introduced me to somebody else, and that was all I know. I don't know the man's name. No deal was there. [R. 217.]

As to the next occasion when I saw Mr. Vitagliano and Mr. Weinstein had already been with me. Mr. Vitagliano came along; that is all I know. He did not partake in any of these negotiations, except to probably interject some remark, "to get it over with." That is all it appeared to me. In other words, he was getting tired of hearing we two argue or barter.

J. C. COOLEY

testified as follows:

Direct Examination

By Mr. Norcop:

My occupation is photographic work, have been 22 years. In October [R. 218] of 1942 I went to 613 North Virgil Street. I made photographs of the interior there. I think those two are duplicates. There are three different pictures. They are unretouched negatives.

(The photographs referred to were received in evidence and marked Government's Exhibit No. 21.)

Cross-Examination

By Mr. Goodman:

This pile of paper in front of the picture was made from two or three different views. One or more of the men might have taken these papers together and made a pile out of them at my suggestion.

SAM PARSNER

testified as follows on direct examination:

My business is tire business 524 West Pico; tires and recapping. I first became acquainted with Mac R. Brown the day of our transaction in September. I sold him some tires September the 9th, 1942. He came into the store and wanted to know if I had anything to sell. Vitagliano was with him. I sold him all I had, 38 tires. The vehicle they had when they took delivery was a red panel. We have an invoice for what I received for the tires. That is our invoice. [R. 224.]

(The invoice referred to was received in evidence and marked Government's Exhibit No. 22.)

As to the conversations, I told them I would have to find out if I could sell them to them, and they said for me to get in touch with the OPA. Mrs. Parsner called the OPA and they said it was O. K. to go ahead and sell. We sold him the tires.

Cross-Examination

By Mr. Goodman:

The only man in connection with the sale of these 38 tires was Mr. Mac Brown. I had no business with Mr. Benjamin Rose. Mr. Vitagliano helped him load. Mr. Brown paid us the money. When I sold the 38 tires, that is all I had. I had some tubes, and they were supposed to buy them, but they didn't. We got the resale permit of Mr. Brown. [R. 225.] He signed a card to that effect. I found that he certainly had a station. The tires were delivered to him during the day, broad daylight. [R. 226.]

Cross-Examination

By Mr. Angelillo:

There wasn't any name on the truck that I can remember. It was a red truck. Mr. Vitagliano helped us get the tires out of the room and load the truck . He did not tell me he had a station. He didn't tell me why he was there. He did not say that he wanted to do business in a hurry. We just went up in the room and loaded it, took our time. [R. 226.] Mr. Vitagliano was wearing service station clothes. I couldn't say he drove the truck away. [R. 227.]

Redirect Examination.

(The government then called Mrs. Parsner was received in evidence without objection.) [R. 227.]

JACK FOSTER

testified on further

Direct Examination

By Mr. Norcop:

Subsequent to the 9th of September, 1942 I had a conversation with Mr. Brown respecting that invoice of Mr. Parsner's at Mr. Brown's place of business—Rappan Service. I asked Mr. Brown if he had purchased Mr. Parsner's tires and Mr. Brown stated that he didn't want to say whether he had or not. He said, "Well it doesn't have my signature on it." I told him. I want to know if he had bought the tires that he said he had sold them. He told me that he would produce the invoice; that he didn't have it at that time and if I would come back the next day, why, he would show me the invoice. On the follow-

ing day Mr. Brown showed me the invoice of which he gave me a copy. It had "T & M Tire Service, 1620 South Broadway." That is the copy he gave me. [R. 228-229.]

(The document referred to was received in evidence and marked Government's Exhibit No. 23.)

Mr. Brown had four or five new tires. He told me these tires had been there for a long time, and he wiped his hand across the dust to show me that they had been there for some length of time. [R. 229.]

Cross-Examination

By Mr. Sullivan:

When I first went to Mr. Brown's place of business and I asked him if he had purchased the Parsner tires, he told me that he did. [R. 229.] As a matter of fact, when I first appeared at the Brown place of business, and I was told to come back the second day with the invoice, I did not talk to Brown at all. No, I talked to his helper on the first day, but the second day I went there I talked to Brown. [R. 230.]

FRANK MONTGOMERY

on

Direct Examination

testified as follows:

By Mr. Norcop:

Prior to May 1st 1942, I was proprietor of the T & M Tire Service, 1620 South Broadway. I went into business therein the early part of 1942, and was in about 11 months. I don't know Mac R. Brown. I did not buy any tires from Mac R. Brown at any time. This is my wrong sales number. My sales number is not AA 17452.

My sales number is AA 89008. I did not have anybody employed by me at any time by the name of Jack Briffit.

Cross Examination

By Mr. Goodman:

I did have a couple of employees working for me. One is named Frank Chamblin. He was mostly doing piecework. My partner and I operated the business. My partner's name was Elmer Turnquist. [R. 230, 231.]

Redirect Examination

By Mr. Norcop:

We had dissolved partnership. The business was mine three months before the first of March, '42.

Recross Examination

By Mr. Sullivan:

T & M Tire Company. It stands for Turnquist and Montgomery. No one else is using that firm name to my knowledge. We never handled new tires. [R. 232.]

HENRY IMMERMAN

on

Direct Examination

testified as follows:

By Mr. Norcop:

My business is the piano business at 246 West 87th Street, Los Angeles. In connection with my business here I have a sales tax number with the State of California. I have never had any dealing in buying new tires. I never drove a machine. [R. 233.]

JAMES B. GRAHAM

on

Direct Examination

testified as follows:

By Mr. Norcop:

Before I went into service my employment was General Manager of the California Provision Company, 1119 East 12th Street, in Los Angeles. I know just one of the defendants in this case — Louis Vitagliano. I have known Mr. Vitagliano about 8 or 10 years. I loaned him trucks several times. It was common practice to loan him trucks occasionally. I loaned it to Mr. Vitagliano on September 8, 1942; license No. PC-R-5363; International Truck. [R. 233, 234.]

Cross Examination

By Mr. Angelillo:

As to whether I know whether he borrowed the truck in question on September 29th, I wouldn't say. He serviced our equipment; had done so for some years last past. [R. 234.] I did not hesitate to loan him a truck any time he asked for it. I had seen oil on that truck. Whether the subject of oil was mentioned at the time, I don't know. I knew that he personally was insured; that is, he had insurance, no matter where he drove that truck. He had previously told me that. [R. 235.]

PAUL B. PARMELEE

on

Direct Examination

testified as follows:

By Mr. Norcop:

I am working at the Miles Transfer Company. In the middle of the summer of 1942, I was employed by the Bay Cities, the Humberts. I don't believe I know who the defendants are. I do not know Mr. Rose by that name. I know the man in uniform by the name of Sam Blank. On August 1, 1942, while I was working for the Humberts, I did go with one of the trucks to 501 East 5th Street, Ontario. That is where I went to. I saw Sam Blank, and I believe this gentleman here. (Indicating Mr. Vitagliano.) I also saw Mr. and Mrs. Humbert out there, and the other truck driver, Sam Dowden, and several other people that I don't seem to recognize, if they are here. We got there together. [R. 236.] There was not any conversation on the part of Mr. Vitagliano that I remember. We all pitched in and loaded these tires. The other man helped also. As to Exhibit No. 19 —I believe this document is one of the documents that I had with me on that trip. [R. 237.]

Cross Examination

By Mr. Goodman:

I saw the invoices for the delivery of these cars that I delivered from Ontario to the place on Virgil Street. The gentleman in uniform here to your rear signed for the delivery of those cars. [R. 237.] I made only one trip, which was on August 2nd. As to Government Exhibit No. 19, I made this trip.

Now that I have refreshed my memory with Exhibit No. 19, it brings back to memory that I heard that his name was Rose, but at that day his name was Sam Blank. I saw his name on the invoice immediately after we got through with this business. [R. 238.]

Cross Examination

By Mr. Angelillo:

I saw Mr. Rose there. There were five of all together. There were three men there, and the other driver and myself. [R. 239.]

SAM RAPPAN

on

Direct Examination

testified as follows:

By Mr. Norcop:

My business is gas station and tire business at 800 North Mission. I owned the Rappan Service, at 2824 Sunset Boulevard. Prior to 1942 I sold it to the Signal Oil Company. Mr. Sam Weinstein and Mac R. Brown operated it. Off and on I had known Mac R. Brown about five years previous. I had known Mr. Weinstein about a year.

This document you are showing me is the sale of stock in bulk. The date is October 15, 1941. [R. 240.]

Between October 15, 1941, and the time I reacquired the station I did have a truck that had T & M Tire Service printed on it. I bought it. We bought the truck from a fruit man. My brother-in-law made actually the transaction. My brother-in-law's name is Adolph Hoffman.

That's the check I issued out to my brother-in-law, which he paid for, cash.

(The document referred to was marked Government's Exhibit No. 25 for identification.)

I was out of business, and I went back into business, around July, maybe a little earlier, 1942. The truck was acquired a few days later. [R. 241.] I did not take the name of T & M Tire Service off the truck. I disposed of the truck several weeks after the freezing of the tires, probably last November, or Christmas.

FRED H. DOANE

on

Direct Examination

testified as follows:

By Mr. Norcop:

My occupation is Sergeant of Police, Los Angeles Police Department. I recall going to the location of 613 North Virgil, in the month of October. [R. 242.]

I believe it was, in September, about the middle of September, I met Mr. Foster, and another gentleman. Later I met Mr. Rose there. I had a conversation with Mr. Rose. We drove in on the lot, and we recognized the OPA man, and recognized Mr. Rose's car on the side road. I got out of the car, and walked over to Rose's car, and told him I was a police officer; I told him that the OPA said he had that place rented, and they wanted to look in there; and he said he had no key to that building. Mr. Rose said, "Unless you are going to place me under arrest I am going to leave." At that time he started his car. I reached in through the window. He grabbed

my arm, and pushed it down, and started his car, and went toward the back, made [R. 243] a lefthand U-turn around some buildings, and as he went around the buildings, he went so close as to scrape them. We followed. I stopped the car and got out. I told Mr. Rose to get out, and he told me that he was going to kick my God damned teeth out. I told him another officer was coming from the police department who wanted to talk to him. Mr. Rose stayed there until the other officer got there. After the other officer got there I left. The other officer was Officer Hamilton.

Cross Examination

By Mr. Goodman:

The occasion of my going out there was I had a call from Mr. Foster. He told me over the phone that he had discovered a warehouse full of tires. I didn't go in any warehouse. I did not have a search warrant when I went out to this place where I saw Mr. Rose. [R. 244.] The warehouse was locked. I believe a little while later I said if it was a State case before we could go in there we would have to have a search warrant. I saw there were tires there. When Mr. Rose came I didn't tell him I was detaining him until he opened the door. He told me he was going to leave. I told him I was going to detain him until the other officer [R. 245] was there. I could have arrested him on suspicion, but I didn't. Mr. Foster did not tell me to detain Mr. Rose. He didn't partake in the conversation. I knew he had a bunch of tires, because I could see them through the window. I knew they were his tires, because the OPA said so. It is a fact that Mr. Rose said at that time that he wanted to call his attorney,

and wanted to have his attorney there. I told him until Mr. Hamilton got there, he couldn't do anything, although he wasn't under arrest by me. At that time I didn't know of any crime that Mr. Rose had committed when I had detained him. [R. 246.]

D. J. HAMILTON

on

Direct Examination

testified as follows:

By Mr. Norcop:

My business is that of police officer of the City of Los Angeles. September 19, 1942, I did on that date go to 619 North Virgil Street, Los Angeles. I saw Mr. Dundas, Mr. Foster, Mr. Earnest, the defendant Rose, and Officer Doane there. I went over and I talked to the defendant Rose, and asked him if he owned — if he had any access to that building. He told me, "No." Finally told us that he had a key to the building, but it was home and he wanted to go home and wanted to call his attorney. I said "All right. We will get in the car and go over to the station. So he got in the police car with me. I placed him under technical custody, placed the handcuffs [R. 247] on him, ordered him out of the car, and knowing that he had the keys, took the keys and opened the door and pushed him into the storeroom where the tires were and there were nine tires there. I went in and kept Mr. Rose in custody, and took Mr. Rose and the nine tires over. I made a record of the numbers of the tires.

(Thereupon the tires were rolled in and placed before the jury box.)

(At this point, the following took place: Mr. Goodman asked permission of the Court to approach the bench, which permission was granted. Thereupon, Mr. Goodman, together with Mr. Sullivan, Mr. Norcop and Mr. Angelillo approached the bench. Mr. Goodman thereupon stated that he objected to the tires being rolled into the courtroom and exhibited to the jury, and that his objection was based upon the following grounds, to wit: that they were incompetent, irrelevant and immaterial, were illegally obtained, and were being rolled before the jury's eyes for the purpose of creating prejudice and appealing to the passion and prejudice of the jury by virtue of the tremendous size of the tires and on the further ground that there was nothing unlawful in the possession of the tires by the defendant Rose, and that the tires were not connected up in any way with the other defendants, or with the commission of any overt act. (The tires that were rolled in and exhibited to the jury were very large, new truck tires.))

Mr. Shippee: I don't think those ought to be exhibited unless they have a ceiling price on them.

By the Witness: Those are the tires that I took over to the Wilshire Station and which I brought here to court myself.

(The tires were admitted in evidence.)

The Court: For the record. Don't you have a list of them?

Mr. Norcop: Yes, we have a list.

By the Witness: They are eight tires listed but nine tires here.

(The document referred to was received in evidence and marked Government's Exhibit No. 26.) [R. 249.]

Cross Examination

Mr. Goodman: The occasion of my going out to 613 Virgil Avenue was Mr. Foster of the OPA called and stated that there was a warehouse full of tires. My captain said to meet him at 613 North Virgil Avenue. I did not have a search warrant when I went out there. Nobody talked about a search warrant at that time that I recall. Mr. Rose was there when I arrived there. He stated he didn't have a key to start out with. I did not have any evidence on hand that Mr. Rose had or was about to commit any felony or misdemeanor. I had no evidence at that time. He was hostile, and I was taking no chances. [R. 250.]

When I got there and I saw new tires stored in this place, that is the only evidence that I had on hand which gave me suspicion or a belief that they may have been stolen tires. I placed the handcuffs on him.

As to what I mean by "technical custody"—Well, if I am going to take him in to the station and he is hostile, or anybody is, we take them into technical custody such as to book him on suspicion of burglary or any felony. He was under arrest. He wasn't booked, but he was under arrest at that time. I didn't take the key off his key ring. I took the keys. I opened the door. I didn't have a search warrant at the time. Then I went in and took the nine tires. [R. 251.]

Then after I got the tires to the station, having issued this receipt, we made an investigation to determine whether the tires were stolen. I found they were not. They

were not stolen. Mr. Rose, he called me first by telephone. I did tell him on that occasion, "You can come and get the tires. We found out they were not stolen." Then I called Mr. Dundas, the attorney for the Office of Price Administration. Substantially, I told him I was going to deliver the tires to Mr. Rose, and he told me not to deliver them and said that he wanted me to hold them until this trial is over. When Mr. Rose called for the tires, I said "I am sorry, I can't give you the tires. [R. 252.] It is a fact that all divisions all over the city had considerable difficulty with stolen tires, and that the tire dealers were having considerable trouble in keeping their tires in such places and under such lock and key that they could not be hijacked, broken into and stolen. I was working with Mr. Foster on these various tire matters for some time. And as a result of my association with that particular office there had come to my knowledge many of these cases where there had been thefts and burglaries of tires and tubes. Mr. Foster was working on it from the government's standpoint, and I was working with Foster through the Statewide burglary detail. When I came out there, I believe Mr. Rose asked the right to call his attorney and be represented by counsel. When he went into the station he could have that right. [R. 253.]

When I got there, there was those nine unwrapped tires there. Just nine of them. I had the handcuffs on Mr. Rose from the time we loaded the tires until we got into the station. The total transaction of getting Mr. Rose into the station didn't take over 45 minutes. [R. 255.]

HENRY L. DOYLE

on

Direct Examination

testified as follows:

By Mr. Norcop:

I am service manager for the Smiling Irishman, 921 South Hoover. In September 1942 I was there. Mr. Rose called on me. Mr. Rose came in and asked me if I wanted to buy any tires and I told him, "No." I asked him what they were. He said he had new tires. I asked him the price. He said they were $35.00 apiece in lots of a hundred or more. I asked him what price they would be in lots of four. He said, "Thirty-seven fifty." And I asked him how I could get in touch with him and he left a card with me. This card is the one. I did not place any handwriting on the card. Mr. Rose did — in my presence.

(The document referred to was received in evidence and marked Government's Exhibit No. 27.)

I did not have any transactions with Mr. Rose as a result of that conversation. [R. 256.] I had a retail sales tax permit. The firm had it about six years. We did not sell tires of any kind. [R. 257.]

DONALD D. HARWOOD

on

Direct Examination

testified as follows:

By Mr. Norcop:

I am employed with the Office of Price Administration as attorney. I have been since the 14th of September, 1942. The first time I recall seeing Mr. Rose was on a Saturday morning at approximately 11:00 o'clock, on

North Virgil Street, 613, in Los Angeles. Mr. John Foster was there. I had no conversation with him. I overheard a conversation. The conversation was that [R. 257] Mr. Rose after Mr. Foster stated hello, or made some greeting, that he, Mr. Rose, in driving down Virgil Street had seen Mr. Foster, and drove in the lot to say hello. Foster asked Rose what he was doing. He said he was fooling around; and Rose asked Foster what he was doing, and he, likewise, said he was just fooling around. Mr. Rose, while sitting in his automobile, stated to Foster, "Why don't you get wise to yourself and quit fooling around with this OPA," or Government stuff, and Mr. Foster said, "Well, that was his business," and Mr. Foster said, "Well, if you don't watch out, you might get hurt." Mr. Rose stated—did I say Foster? Mr. Rose stated, "If you don't watch out you might get hurt." That is all the conversation I can recall.

Mr. Goodman: I move to strike out the answer on the ground that it is incompetent, irrelevant and immaterial, and does not prove or disprove any issue in the case, and is only brought here to inflame the minds of the jurors, your Honor.

The Court: Motion denied.

I met Mr. Mac R. Brown on or about the 15th day of September, at a service station on Sunset Boulevard. Mr. John Foster was with me. Mr. Foster and Mr. Brown had a conversation in my presence. There might have been a party in the service station, but there was no one within hearing. We drove into the service station. [R. 258.] Mr. Foster asked Mr. Brown if he had the invoice, and he produced an instrument in writing, and handed it to Mr. Foster. Mr. Foster asked Mr. Brown where the

tires were. He said he did not know. He had sold them. Mr. Foster stated, "You will have to get the tires back." Mr. Brown stated, "I don't think I can get the tires back. I will try to get them back, but I don't know what I can do about it, or how." Exhibit No. 23 is the instrument in writing which was handed to Mr. Foster by Mr. Brown.

I first met Weinstein either on the same day that I had met Mr. Brown, or the following day, at a service station on Riverside Drive. Mr. John Foster was with me. [R. 259.]

NORMAN IRWIN

on

Direct Examination,

testified as follows:

By Mr. Norcop:

I am an auditor employed by the Eagle Oil Company. I have been with the Eagle Oil Company since September, 1940. I know of my own knowledge any of the subsidiary concerns controlled by the Eagle Oil Company. There is one; The Golden Lubricants, Incorporated; has had a station at San Fernando and Winchester streets in Glendale. [R. 260.] Golden Lubricants had a California sales tax license number and had about 45 stations all together. The station at San Fernando and Winchester Road in Glendale had a specific number. I know definitely the station did not carry on business at that location after April 6, 1942. No one by the name of Joe Munn was ever employed by my company.

Cross-Examination

By Mr. Goodman:

Our various service stations each had a number. No. 28 was given to the station on San Fernando. We had a station at 2800 San Fernando Road, and we still have it. I have a permanent record in which the names of all employees are listed. I have not brought that record with me. [R. 261.] My company did sell new tires and tubes up to the time of the freeze; and thereafter, subject to the rules and regulations and directives of the Office of Price Administration. We kept a stock of new tires on hand at some of our stations. As to what information I base my statement on that it closed exactly on that date. [R. 262.] My opinion is based upon inter office communications and not upon a physical examination of the premises, of the physical closing of the station.

The manager in charge of that station on and before April 6, 1942, I believe his name was Lou Zweighoft. I never saw him. There were other persons employed there, but I can't say who. The direct hiring was done by the station manager and approved by our field man. The master number of Golden Lubricants, Inc., that is, their seller's resale number was AGX 6285-8. [R. 263.]

HERMAN STEINBERG,

on

Direct Examination

testified as follows:

By Mr. Norcop:

I operate a service station and tire place at 901 East 9th Street. I have carried some stock of new tires. I

know a Mr. Sam Weinstein. I know Mr. Phil Taplin here. Both of these men came to see me at my station in the past year. I had a conversation with them. [R. 264.] The big stock of tires that I had, new ones, they asked me whether I wanted to sell them, and I told them that I didn't care to. I did not sell them any tires.

RAY H. PADDOCK

on

Direct Examination

testified as follows:

By Mr. Norcop:

Prior to three weeks ago, I was a tire jobber. I was in that business here for 13 years. Among the persons seated at the table—the only man that I remember meeting is Mr. Rose—yes; Mr. Brown, too. I called on Mr. Rose about a year ago at a Shell station. I left my card [R. 265] and he called on me at my office a week or ten days later. I had a list of tires that was available in the California Warehouse that was just down the street. I told him that. We went down to the warehouse and thoroughly examined them. I would say there were approximately 60 or 70 tires there. They were all new, in wrappers. They were the property of Guy Bryan. I left where the tires were and went just down the street to Guy Bryan's there. Mr. Rose went with me. I left he and Bryan to go ahead and make any deal they wanted to. [R. 266.]

Cross-Examination

By Mr. Goodman:

I was never employed by Mr. Guy Bryan. Mr. Bryan at one time was a carload buyer of tires from me. Mr.

Rose did not buy the tires. I knew that Mr. Rose was a retailer, licensed to purchase those tires. Nothing wrong about the attempted transaction that I knew of.

Cross-Examination

By Mr. Sullivan:

Mr. Brown did not have anything at all to do with this transaction with me personally, only Mr. Rose intimated that Mr. Brown would have to approve it. Mr. Rose took Mr. Brown with him to consummate the deal. I did not have any conversation with Mr. Brown.

NATHAN LEVY

on

Direct Examination

testified as follows:

By Mr. Norcop:

My business is Service Station Operator in Los Angeles. I know Mr. Vitagliano, Mr. Lieb, and I know Mr. Weinstein slightly. In that connection I saw Mr. Vitagliano in March, 1942, at my service station at 8th and Wall streets. Besides Mr. Vitagliano and I, there was a man there. [R. 268.] He did not come with Mr. Vitagliano. He was driving another car. I had a conversation there at that time with Mr. Vitagliano. I was authorized to sell tires; I was a dealer in new and used tires. On another occasion Mr. Vitagliano discussed tires with me. He told me he had some tires and if I was interested. I told him, "No; I was more or less through." And he asked me if I knew anybody else who was interested in tires and I told him I did not.

Cross-Examination

By Mr. Goodman:

I was still in business at the time that Mr. Louis Vitagliano offered to sell me some tires on the last occasion. I still had my retail sales permit. [R. 269.]

NORMAN IRWIN

recalled.

Further

Direct Examination

By Mr. Norcop:

I have brought a list of the 45 service stations of the Golden Lubricants, together with the California sales tax permit numbers. This is it. The number I see here that I saw here this morning is AGX-6285-8. I find that number on the original invoice there, the white one of Exhibit 28. My sheet shows that that station was located at San Fernando and Winchester. My information that I brought is merely verification that it was closed on April the 6th, 1942.

Cross-Examination

By Mr. Goodman [R. 270]:

The original inventories were purchased by Golden Lubricants from our tire store on 3300 Sunset boulevard.

As to whether when we made purchases of new tires and tubes through that central location we used or gave any other sales tax number other than "AGX-6285-8"—That would depend on which station was buying the tires. This list I have here does have the number AGX-6285-1. The only difference between that number and the one he gave me is the last number. That was put on

by the State. We did have the number AGX-6285-8. During the time this station was in operation, No. 28, the number that I have here on my list is the same as I have on this item AGX-6285-8; which corresponds to the number on Government's Exhibit No. 28, AGX-6285-8. I did not bring a list of the various employees.

WILLIAM J. DAVIS

on

Direct Examination,

testified as follows:

By Mr. Norcop:

Mr. Norcop: If there isn't any objection, I would like to have the list the witness referred to marked for identification.

(The document referred to was marked Government's Exhibit No. 29 for identification.)

My occupation is Service Station Operator. In May, 1942, I was engaged in that work. I was then working at 500 South Atlantic, employed by Urich. I made a sale of the merchandise that is listed on this piece of paper.

(The document referred to was marked Government's Exhibit No. 30 for identification.)

Two men [R. 272] came in and wanted to buy some tires. They came there in a vehicle. I have two license numbers there. I delivered the tires at the same time the men came there. They were paid for. The amount of money that is shown on the invoice was what I received. There was no conversation—just mostly about the price; how much I wanted for them. [R. 273.] There is a retail sales tax number on the ticket—No. A 24695.

That was placed on there at the time the transaction was being consummated.

Cross-Examination

By Mr. Goodman:

I held a board of equalization seller's permit at the time of this alleged transaction. I did not receive any instructions from the Office of Price Administration, or any representative thereof, telling me [R. 274] how to make a sale of that kind. I was positively of the opinion that I was making a lawful sale under the rules, regulations and directives of the Office of Price Administration. They represented themselves as dealers. They told me where this station was located. The address is on the slip. When I made the sale I took the pains to insert on the invoice that these tires and tubes were being purchased for the purpose of resale, and I so indicated that on the invoice.

I never had any business with Mr. Benjamin Rose, nor Mr. Joseph Lieb, nor Mr. Mac R. Brown, nor Mr. Phil Taplin. In reference to the other two gentlemen: they are similar to the guys, maybe the same, I am not positive. [R. 275.]

LEO ISENHOWER,

on

Direct Examination

testified as follows:

By Mr. Norcop:

I am an employee of the California Overall Cleaning Company. I run a laundry route. In my work I use a Chevrolet sedan laundry truck. As to the persons sitting to your left in the court room—I know only Mr. Rose.

I saw him several times. I am not personally acquainted with him. I saw him sometime in 1942. I first saw Mr. Rose at a service station immediately north of the J. L. Schlosser Company, on Western Avenue. The name of the customer there was Fenton, and another man named Willie. [R. 276.] It is a small office, and the customer came to pay his bill, and Mr. Rose, I believe, was standing in that office there one time. I needed inner tubes for my trucks. I talked to him about it. The sum and substance of the conversation was that he had some inner tubes for sale. He said he could sell them to me, and I said I would like to get them, so I made an agreement to buy them from him. There was a statement as to price of around $4.00 apiece. I got them at another place. It was near 9th and La Brea, on a vacant lot, next to a large building. He brought along the inner tubes I had agreed to buy from him, and I bought them from him. I think there were six boxes of them. I [R. 277] think there were six in a box. That would be 36 inner tubes. I paid him. I generally have cash in my pocket, and I paid him—it seems to me like I gave him mostly cash. I think there might have been one or two checks. They were not my own checks. I was not a retail tire dealer at that time.

Cross-Examination

By Mr. Goodman:

I don't think I was introduced to Mr. Rose at the gasoline station. I didn't know Mr. Rose prior to that time. I had not actually formally met him. I just saw him. [R. 278.] I have not related all the conversation on direct examination that took place between Mr. Rose and I before Mr. Rose agreed to sell me the inner tubes.

As to whether I recall telling him that I wanted to buy the tubes for the purpose of resale and that I had a retail sales permit—I don't think it was mentioned. I don't recall saying anything in that reference either yes or no.

As to whether I tried to give Mr. Rose the impression that I was a dealer—I don't think I tried [R. 279] to imply any impression, other than that I wanted some inner tubes. I don't think I told him that I would subsequently give him the number of my retail sales tax permit. I told him I had several trucks. I probably said that, all right, because I did.

As to whether I told Mr. Rose also that I had a lot of business with gasoline service stations and that I was buying tubes for that purpose—I don't recall anything along that line of conversation. As to why I bought 36 inner tubes when I had only two trucks—the two trucks using inner tubes, in my experience, that the inner tube is only good for about six months and it will take ten tubes to give an extra set for each one. I was for laying in stock. I didn't want to get put out of business. [R. 280.] Mr. Foster and Mr. Norcop talked to me before I came here in reference to that subpoena. Mr. Foster contacted me before this trial. That was a week ago Monday. I had seen Mr. Foster several times, but not definitely regarding this trial. I have known him for about six months. I met Mr. Foster approximately a month after this transaction with Mr. Rose took place. I met him in Santa Monica. I just happened to run into him. It was at the police department in Santa Monica. I was under suspicion of having stolen property. Mr. Foster asked me to come down and talk to him about [R. 281] it. It is not a matter that refers to this case

in particular. It is a separate transaction. Mr. Foster started to talk about these tubes first. I didn't have them any more and I was trying to get them back again. He asked me where I got the tubes. I can't tell you the exact conversation, but the gist of it was that I did get the tubes from Mr. Rose. I had been informed that I had violated the rules and regulations of the Office of Price Administration in that respect before that time. I have been informed of it pretty regular. I haven't been threatened or told that I would have to testify against Mr. Rose. I was subpoenaed down, but I am not testifying against Mr. Rose or for Mr. Rose. I didn't intentionally do it, but so far as I know, I am being charged with that violation. They have placed something against me. I was in court a week ago Monday, and I am to appear [R. 282] in court again the following Monday. My matter is not yet determined.

Q. By Mr. Goodman: Did you dispose of any of those 36 tubes by sale?

A. I refuse to answer the question, unless I have to.

Mr. Goodman: He has waived his immunity.

Mr. Norcop: If the court please that is not part of the examination of anything that was asked him before on direct and he did not ask to make him his own witness.

Mr. Goodman: That is the entire transaction.

The Court: Just a moment. I am going to sustain the objection. Just remember, gentlemen, that this man is not on trial. The defendants that are named in the indictment are the defendants in this case, so this witness is not on trial.

Mr. Goodman: I want to take an exception, and I also want to make an offer of proof, your Honor.

The Court: You will have to make your offer of proof in the absence of the jury, and make it in the record and exception will be noted. You can make it during the recess.

As to the other defendants in this case—I have looked the gentlemen over here around the table you are sitting at. I have never [R. 283] seen any of them before.

DAVID M. HOFFMAN

on

Direct Examination,

testified as follows:

By Mr. Norcop:

I am an enforcement attorney employed by the Office of Price Administration. I have been with the Office of Price Administration since the 26th of May of 1942. I met Mr. Rose at the Office of Price Administration, 1033 South Broadway, about the latter part of June. This stenographer made notes of the happenings upon my request. I talked with Mr. Rose upon that occasion. [R. 284.]

Mr. Rose came into the office with Mr. Foster and Mr. Storms. We went into one of the offices and sat down and I proceeded. Mr. Storms informed me that Mr. Storms had been down to Mr. Rose's service station located, I believe, on the corner of Olympic and Hill, and had had a conversation with Mr. Rose in which Mr. Rose had offered to sell Mr. Storms four new tires for, I believe, a price of $175.00, and had offered also to sell Mr. Storms some retreaded tires for, I believe, $16.00

or $17.00 each. The witness said that he then asked Mr. Rose certain questions concerning what Storms had said to each of which Rose replied "I refuse to answer." [R. 285.]

I asked him if he sold used tires. He said, "Yes, we sell used tires." I said, "Where do you sell used tires?" He said, "My brother runs the parking lot on 6th Street." I said, "Is that the Capital Auto Parks that I asked you about before?" He said, "Yes." I said, "Does your brother run that place?" He said, "Yes; but I have the license." I said, "You also have the license for the Shell Auto Park"—I believe that was the name of it—"on the corner of Olympic and Hill?" He said, "Yes." I said, "Now, did you offer to sell Inspector Storms some new tires for $175, as he states?" He said, "I never saw Inspector Storms before in my life." I said, "You know Inspector Foster, this gentleman here?" He said, "I never saw Inspector Foster before in my life." I said, "Mr. Storms, will you repeat again what you told me again about the transaction of purchasing or being offered some tires?" At which time, as I recall, Mr. Storms again went through and repeated what he said before. [R. 286.]

I said, "Did he ask you or did you offer to state that you had any rationing certificate?" Mr. Storms said, "No." I then said to Mr. Rose, again, "Mr. Rose, did you offer to sell these new tires or retreaded tires to Mr. Storms?" He said, "never saw Mr. Storms before in my life." I asked him if he sold tires without rationing certificates, and he said, "You can't sell tires without rationing certificates." I said, "Did you sell tires without rationing certificates?" He said, "I refuse to answer."

From that point on Mr. Rose stated that he would refuse to answer any further questions. At the conclusion, I said, "Would you like to have counsel?" He said, "Yes." I said, "Very well; you can have counsel. Would you like to come back with your counsel on this matter?" He said, "I don't think I have to come back at all." I said, "Very well." At which time we concluded our conversation. [R. 287.]

Cross-Examination

By Mr. Goodman:

I am an attorney-at-law. While I was in this office I had sitting next to me Mr. Foster, an investigator of the Office of Price Administration. I also had a stenographer from the Office of Price Administration. There were also there from the Office of Price Administration myself and Mr. Storms. I did not bring Mr. Rose. I did not request him to come at all. He came in with Mr. Foster and Mr. Storms. He came in with Mr. Foster.

I believe that there was a statement to the effect that Mr. Foster had asked him to come down to the office. [R. 288.]

The purpose of that interview was to find out what Mr. Rose and Mr. Storms had to say about this matter. I didn't know. As to whether if Mr. Rose had said, "Yes; I have sold these tires," I would have brought criminal proceedings; whether that was the purpose of it—Not not necessarily.

The purpose of those hearings are to interview parties to find out what they have got to say about a transaction, not to obtain admissions. If, incidental to the

interview it happens to be that the man admits that, that is one of the things that takes place; yes.

I did not tell him at the commencement of the conference that any statements he might make in that office there would not be used against him and that I would give him immunity. I did not tell him that he had a right to have a lawyer until the conclusion of the conference. I didn't tell him that because I didn't know that there was anything involved in the matter until after Mr. Storms had recited the story. I did not tell him that he was entitled to a lawyer until the conclusion of the conference, after I had interrogated him on all [R. 289] these various questions and he refused to answer them.

When I found out as to Mr. Rose's position, I told him that he was entitled to a lawyer if he wanted. I have been a prosecutor for many years. As to why, when I found no violations—I wanted him to tell me what he had to say. I wanted to find out what his position was and what he had to say about the matter, not to find out if he was guilty or innocent, but to find out what he had to say.

Mr. Storms had told me, in the presence of Mr. Rose that Mr. Rose had offered to sell him tires, new tires, without certificates. That is a violation of the rationing law. [R. 290.] Mr. Storms was an OPA representative. He was not sent out by the Office of Price Administration to induce Mr. Rose to make a sale to him. He was sent out to investigate a complaint that had been received that Mr. Rose was selling tires, without certificates, for prices over the ceiling. As to whether at the conclusion of that conference I transcribed those notes and gave Mr. Rose a copy—I can't recall whether he was given a copy. [R. 291.]

(In Judge's chambers. Present: The Court; and Messrs. Norcop, Sullivan and Goodman.)

Mr. Goodman: My offer of proof is to prove by the witness Eisenhower that after he brought these tubes, he sold them to divers persons at a profit.

JOHN FOSTER

recalled.

By Mr. Norcop:

Referring to the 23rd or 24th of June, 1942, I was present on the occasion that Mr. Hoffman mentioned. There was present Investigator Storms, and the young lady who was taking down the dictation, and Mr. Rose, Mr. Hoffman and myself.

Before Mr. Hoffman met him—I had a brief conversation with Mr. Rose. I merely went in, with Mr. Storms, in to Mr. Rose's place of business, at Olympic and Hill, and asked Mr. Rose if he would get in the car and go over to the Office of Price Administration with us, which he did. Nothing took place before Mr. Hoffman met Mr. Rose, or until we went into the office, and [R. 292] asked Mr. Hoffman if he would come into the office with us. We discussed the situation with Mr. Hoffman, and gave him the details of what had previously happened. That was in Mr. Rose's presence. We told Mr. Hoffman that Mr. Storms had contacted Mr. Rose; Mr. Rose had made an offer to sell him some tires, and that I was standing across the street at the time, and that Mr. Rose was going to go in Mr. Storms' car with him to pick up these tires, and that Mr. Rose's father had seen me, and run over and whistled to Ben, called him back, and they backed up the car, and Mr. Rose looked

and saw me, and went back over, and talked to Mr. Storms, and Mr. Storms drove out, and came to me, and told me they had refused to sell him. Mr. Hoffman did the examining, to the best of my recollection; asked most of the questions. After this statement had been taken from Mr. Rose, Mr. Rose told me that he would like to speak to me alone. I followed him [R. 293] outside. We went out in the highway where we stood. Mr. Rose asked me if I remembered seeing him any place, and I told him I didn't believe I did. He said "I know you. I have seen you up at Louis Vitagliano's, on his lot." I said, "What were you doing up there?" He said, "What do you think?" I asked Ben at that time to tell me, I said, "Why don't you come across and tell me what you know about this deal? It is going to make it a lot easier if you tell us all you know about these things, and let us get it over with." He said, "I don't think I can, as long as there is anyone writing down what I say." I next met him two or three weeks after that date at his service station at 955 South Hill street. I had a conversation with him. No one else was present. I asked him if he knew anything about another tire movement and he said he possibly did, but he didn't care to discuss it. He said, "Jack," he said, "You are on the wrong side of this thing. Why don't you get wise to yourself ,and get in on the right side? [R. 294.] There is some money to be made." So I told him I wasn't interested. He said, "Well, I know where there can be a few thousand dollars picked up if you just lay off. I know one thousand you would get right away, and I know several others that you can get, and I would be glad to take care of it for you." I told him I wasn't interested in that at all. About that time some fellow went by

and he asked me if I saw Shorty go by, and I said yes. He said, "You had better get out of here." I said "Why?" He said, "Those fellows don't like to see you in here. They are liable to come back. I have gotten in trouble with them already, because they have seen me with you. If they see you in here a lot, they might think I am telling you a lot of things I shouldn't." Shorty is Shorty Herman Hoffman. Nobody concerned with this case. I saw Ben in Mr. Dundas' office. Mr. Earnest was present. That was about the middle of July at 1037 South Broadway, in the Office of Price Administrator. Rose said he knew he was in trouble, and he had been thinking it over, and he was just wondering how he could get out. He said, "I am willing to spend [R. 295] $500, or whatever it is, to get out of this, and get clean and straight again." Mr. Dundas or myself said we did not know how deep he was involved at that time, and we would like to have him tell us just how deep he was involved; what he had done. He said, "Some of these boys I have been dealing with came around, and put a gun, laid a gun on the counter here, and said to me: "You see this? You wouldn't want to be found lying around the road some place, would you?" They asked him, "Do you know what that is?" He said, "Yes, it's a gun." And they said, "You wouldn't want it used, or anything, would you?" He said no. They said, "Just remember; you don't know anything when somebody comes around to ask you—" We told him we did not know just how deep he was in the thing, and if he wouldn't tell us we would have to continue with our investigation. I next saw Mr. Rose at his service station at 955 South Hill. [R. 296.] I believe it was in the latter part of July. We were alone. I asked Mr. Rose

if he had purchased some tires from Mr. Kreling. He told me he had. He said he had them over in his garage. He said that would be O.K. for me to see the tires and check them, so I made an appointment with him. He did not keep the appointment. The next time I saw him was about August 10th or 12th in the parking lot that he ran in the first block south of his service station on Hill Street. I asked him what he had done with these tires. He told me he had them; he wouldn't let me see them until the first of the next month. I told him I couldn't wait that long. He said, "Well, if that's the case, why, you had better not do any more talking with me. I guess you had better see my attorney." I said, "Does he have invoices, or anything showing what happened to the tires?" He said, "No, he doesn't but he should [R. 297] have, by the time you talk with him." He told me the name of his counsel. He gave me Mr. Benjamin Goodman's name and address. The next time I saw Mr. Rose was, I believe, September 19, 1942, at 613 North Virgil avenue, Los Angeles. I was walking north on Virgil, right in front of 611. Mr. Rose pulled up just as I crossed over the sidewalk. I was probably 30 or 40 feet from there. He saw me, and he just kept on going. We passed the time of day there on that occasion. Again he made the statement to me that he thought I was on the wrong side of this, and asked me if I was still [R. 298] fooling around with the OPA. I said I was. He said, "Well, you are still on the wrong side. I think you are dealing with some pretty tough boys. You are liable to get hurt." I told him I would take that chance. He said so long, and started his car, and left. Then I went to the rear of this particular building we were standing on the side of. I saw the windows were all covered over with

cardboard, and I couldn't see in it. There was a little glass broken in the back of this, and there was a piece of *tarpulin* hanging over it. I tore a hole in the tarpaulin, and looked in there. This place was, I would say, about a quarter filled with new tires and new tubes, and I then called our office, and got hold of Mr. Dundas, and advised him of that. Later I saw Mr. Rose again, same afternoon, at the same spot. Mr. Dundas and Mr. Earnest were there. Officer Doane left at the same time that I came on the scene. Mr. Hamilton asked Mr. Rose if that was his tires in his place, and Mr. Rose stated that they were not. He asked him who they belonged to. He said he had sold them. He asked him to whom he had sold them. He said that there were invoices to show that. He asked him if he had a key to the place. He said he did not. He asked him who had the key. He said the man he sold the tires to. He asked him if he rented this place. He said he did not [R. 299]; he did not know anything about it. Officer Hamilton asked him if he had a duplicate key. He said he might have one at home. He said "Well, let's go over there and see." So we started out, and Mr. Hamilton stopped and went over and talked to Mr. Dundas and Mr. Earnest. He came back, and put the handcuffs on Mr. Rose, reached in his pocket, and there was a chain hanging out of his pocket, and he pulled the chain out of his pocket, and said, "I want to see if these keys fit the door." He went back, and the first key he tried opened the door. He shoved Mr. Rose in. He said, "I thought you did not have a key." Rose did not say anything. We told Rose that we wanted to inventory the tires, and we proceeded to do so. There were exactly nine tires totally unwrapped. They had quite a few burglaries around stations in that neighbor-

hood, and he advised Mr. Rose that he [R. 300] would take those in, and run those, to see if they had been, stolen or reported as stolen.

I believe at that time Officer Hamilton and Benjamin Rose left, and I called a commercial photographer, who has testified here, and had him come over and take pictures of the interior of the building. We counted the tires. I have a list of those. I believe there were 67, other than the 9, and if I recall correctly, there were 431 new tubes. We then proceeded to the Wilshire police station, and we got over there and we met Benjamin Rose coming out. [R. 301.] I believe the next time I saw Ben to talk to him was at his other warehouse on Sunset Boulevard. No one else was present. That was on October 13th about 9:00 to 9:30 A. M. I saw Ben go into this driveway where the tires were. I waited for some time and then walked in. As I walked in, the rear had been filled with tires, and he had shoved some tubes in the side. He was covering them over with a blanket before letting the back of the car back down. I said, "Hello, Ben." He turned around, and he made the statement he said, "Can't I do anything without you being on my trail?" [R. 302.]

The door was open to this warehouse. I looked in, and I believe I counted 8 tires of a large size, and close to 100 or over, new tubes. In the center of the room were numerous wrappings of tires, and a large number of empty boxes. I told him I knew how many he put in there. He said, "You know where these came from, don't you?"

He said, "Those are part of the tires I had in the Virgil Street warehouse. I split them up over there, and

brought half over here." I said I knew that wasn't so. [R. 303.] I did call his attention to his tracks being there, and even pointed at them while he was there. I don't believe he replied to that. I think he just laughed, and got into his car, and left. Only he locked up the door of his warehouse. I saw Mr. Rose on the next occasion, when he came into the office. That was after the indictment was filed. I first met Mr. Vitagliano, I believe on May 26th, 1942, at 12th and Stanford Place, Los Angeles, on the East Side. Mr. William Fitzer was with me.

We went to this premise and went on back to a steel covered shed where two vans were, and were looking around the vans, and Mr. Vitagliano came back and asked us what we wanted. We introduced ourselves as investigators from the Office of Price Administration. He asked us what we still wanted, that he did not see any connection. We told him we wanted to know where the tires had come from. He informed us that he had already straightened that out with the police officers. We told him we would have [R. 304] to know also. He said, "Well, the tires don't belong to me, so there isn't must information I can give you." He said the police had broken his locks off. He stated that the tires belonged to a friend of his by the name of Mr. Phil Taplin, and that Mr. Taplin had the invoices to show for it. And we asked him to get hold of Mr. Taplin for us. He said he would. So he went in and called for Mr. Taplin, and we had some other conversation with Vitagliano regarding what part he had played with the tires. He said he had no part whatsoever; that he was a friend of Mr. Taplin, and he was merely doing him a favor by letting him put trucks there, leave trucks there until he could find

some storage space for them. The same day we came back and saw Mr. Taplin. At that time we looked at the invoices.

I believe Mr. Vitagliano got the invoices, either he or Mr. Taplin. We scrutinized the invoices, and saw that they had come from the Perfect Made Tire Company, and asked Mr. Taplin what he intended to do with the tires. He said he [R. 305] would hold them until after the war, and he figures there would be quite an increase and demand for rubber tires.

We asked him why he did not get them in a bonded storage house. He said he would, if he could find one. Fitzer suggested Bekin's at Alameda, near Fourth. We proceeded toward the Bekin's warehouse, and pulled up. We saw the trucks there, and saw Mr. Taplin and Mr. Vitagliano coming out of the office of the Bekin's Storage Company, down the street; they talked for a few minutes, and then got in the automobile and left. I went in to Bekin's Warehouse. We stayed there all the rest of the day. Around 5:00 o'clock they drove up. "They" are Mr. Vitagliano and two men. The two men jumped in these vans. One of the vans turned around, and started away. We waited until the second one did. [R. 306.]

We followed one of the vans up to 92nd and Crocker, where he went in to the Market Garage there, and they came out and left.

We called the police department, and the police department and myself split up the time. I left there on Thursday around 1:30 or 2:00 o'clock, and a man came over and relieved me. Shortly after that, probably at 3:30 or 4:00, we got a phone call from this man. Mr. Fitzer and myself got in my car, and drove to Wabash

and City Terrace. We sat there for an hour and a half or two hours. [R. 307.] They pulled one van out while we were there, and drove the other one in. They drove the other one past it; drove the other, and backed into the place. Mr. Fitzer and I walked in. Mr. Vitagliano, Mr. Taplin, and Mr. Weinstein were in there. They had just finished unloading these tires, and were stacking them up in this storeroom. They said "Well, it's a cinch we won't lose these tires. We are getting plenty of protection," and asked us why we didn't come a little earlier, so that we could help them unload. We told them all we wanted to know was where the tires were going.

Mr. Vitagliano followed me out, and said to me, "I hope you don't worry about these tires, because Mr. Taplin is a fine boy. He won't do anything wrong. [R. 308.] Don't worry about them, because they are in safe hands." Subsequently we did ask Mr. Taplin to come to the Office of Price Administration.

I saw Mr. Vitagliano in July at his service station on Twelfth and Stanford. Mr. Earnest was with me. His employees were around the service station, but they weren't in hearing of us. We asked Mr. Vitagliano if he knew Mr. P. R. Brown, and he stated he did not. We asked him if he had bought any United States batteries, and he stated he had. We asked him where he bought those. He said from some fellow over on Temple Street. We asked him if he knew that was P. R. Brown. He said he did not know, but it was at 1019 West Temple. We asked him if he had gone with Mr. Urich over there. He stated he believed he had been introduced by Mr. Urich to this gentleman, but did not recall exactly what his name was. [R. 309.]

Exhibit 30 for identification. I saw Exhibit 30 a few days before I went into Mr. Vitagliano's place of business. Referring to the symbols or numbers at the top of Exhibit No. 30 for identification. I found it was registered to Mr. Louis Vitagliano's sister. It was a pick-up truck that was being used by Mr. Vitagliano, which was always on his lot. Car No. TOZ143 was a Ford coupe. It had belonged to Mr. Louis Vitagliano. He had sold it to Mr. George E. Wolfe, who was one of the employees of his. [R. 310.]

Mr. Norcop: We now offer this exhibit in evidence, if Your Honor please.

Mr. Angelillo: If Your Honor please, we object to it, particularly for the reason that most of it is hearsay, and further, the testimony of the witness does not correspond with the testimony of the witness who produced it in court this morning, or who identified it. The word "International" is written on it, indicating International truck. He testified apparently, from some investigation, which we do not know anything about, and the records of the Motor Vehicle Department would be the best evidence concerning the Chevrolet truck. Obviously, the Chervrolet and the International are not one and the same person, and there is no identification or connection shown so far that the defendant Vitagliano is connected with this Exhibit No. 29. [R. 311.]

The Court: I think it is admissible. The weight will be a question with the jury. I will admit it.

(The document referred to was received in evidence and marked Government's Exhibit No. 30.)

A few days later we talked to Mr. Vitagliano at his service station at Twelfth and Stanford. We had a few

words. Viatagliano told us he had a letter from Mr. D'Orr stating he could sell tires. He showed it to us. Mr. D'Orr had answered his letter and said that he could sell tires if they were used tires. He said he hadn't sold any more tires. I was in [R. 312] there again. I was by myself. Mr. Vitagliano was there. It was just prior to the indictment. I told Mr. Vitagliano we had quite a bit of evidence that he was selling some tires to some squeegee place; and to the Gloege Coffee Company, and to some of the employees down at Bullock's or the Broadway, and he stated he had not since the freeze. He says, "Well, I will tell you; I have been implicated in a couple of loads of tires, but this you are not going to be able to implicate me in." So he laughed, kind of.

I met Mr. Taplin on May 26th. [R. 313.] I saw Mr. Taplin at his place of business, 4441 Malabar Street. Mr. Earnest was present. I asked him if he had found out anything about the tires and he told me that he believed that he had been shorted those tires; that they couldn't have gotten off unless the police stole them. I believe it is October 5th that I saw him, and at his place of business again. Mr. Earnest was with me. I asked him for the invoices that I had talked to him on the telephone about. He had them ready for me and handed them to me, I looked them over. He had one invoice showing the sale, and three or four sheets showing the makes of the tires and all where he had sold these tires to Sammy Rappan, or Rappan Service, rather, signed by Mac R. Brown. On that occasion I asked Mr. Taplin how he come to sell the tires if Mr. Vitagliano and Mr. Weinstein had sold them also, and he said they didn't own them, any part of them. I said, "I thought you told me that [R. 314] in the presence of Mr. Dundas and Mr. Earnest, that these tires were only a third yours." And he said, "Oh, I paid them

off a long time ago. They belong to me." I asked him if Mr. Ben Rose had anything to do with those at all. He said, "Let them speak for themselves." He said, "I sold them to Mac. R. Brown and that is his signature." I said, "Well, how did he pay you?" He says, "Cash." I said, "What did you do with the money?" And he said, "What do you usually do with money? I put it in the bank." And with that I got back in the car and we drove away."

I first met Sam Weinstein around May the 29th, and it was at 3200 City Terrace; I had no conversation with him at that time. I saw Mr. Brown in a Signal Oil Service Station. I showed him a card [R. 315] with Mr. Weinstein's name in one corner and Mr. Mac R. Brown's on the other, and he said, "Well, I know him, but I am not proud of it." I said, "What is the matter?" He said, "Well, we don't speak." He said, "We don't get along." And he says, "I don't have anything to do with him." I said, "When is the last time you ever saw Mr. Weinstein?" And he said, "Oh, it has been months."

Then I went down the street and watched the service station. He got on the telephone and called several times. He jumped in a red Pontiac car and started out. I followed him. He went over to Mr. Weinstein's service station. Mr. Weinstein got in the car and they sped away. I saw Mr. Weinstein about either the next day or two days thereafter at his service station. There were quite a few men there. I asked him if he knew Mr. Mac R. Brown. [R. 316.] I asked him if he knew where he was. He said, "No"; he didn't know much about him; that they didn't get along very well. I don't believe I ever talked to Mr. Weinstein regarding the case after that.

On this first occasion that I met Mr. Rose I did not have arrangements with Mr. Storms that he was going in

to the station of Mr. Rose and endeavor to buy some tires. Mr. Storms had talked to Mr. Rose on the telephone that morning. The arrangements I knew nothing about before that. I don't know how Mr. Rose had met Mr. Storms before that telephone conversation. Only what Mr. Storms told me. [R. 317.] I went to see if the sale was going to be made, but about the arrest I don't know about that. When I went out there I stood over right across the street on the corner. I had previously discussed with Mr. Storms how the two of us were going to work this particular matter; I was going to stand outside and Mr. Storms was going to go in there, so that I could observe the sale and be a witness to it. Mr. Storms went in there and no sale was made. I waited. I was walking down the street and Mr. Storms came down and met me. We went back to Mr. Rose's station, the two of us. That is the first time I met Mr. Rose. This first time I went out there to get him on a sale and didn't get him. [R. 318.] I did not ask him to become an informer. I had not prior to that date parked my car in his station. As to parking it by paying him for parking—in his service station, I never parked there. I did not ask him to find a customer to buy my car. I would have taken around $1250.00. I told Mr. Rose that I was going to sell my car; and he said, "I will make a deal with you." And I told him that I was not interested. And he called me up—in fact, a couple of times—and told me that he had around a $700 deal or something, and I still told him that I was not interested. I did not tell him I wanted $1200. I didn't give him any price. At the time that Mr. Storms and I went out to Mr. Rose's station [R. 319] he had not purchased any tires at that time.

As to whether I knew that he had bought tires legitimately, as a retailer—

He didn't break it down, whether it was legitimate or illegitimately. He used the phrase "mixed up." He used the names of some persons with whom he was mixed up. He used Les Carson, Louis Vitagliano and Leo the Lion. [R. 320.] The third occasion is when I saw Mr. Rose at Mr. Dundas' office in the middle of July, 1942, to the best of my recollection. Up to that time I don't believe I had received any knowledge that Mr. Rose had bought any new tires from any retailer who was liquidating, other than from the lips of Mr. Rose.

As to the occasion for Mr. Rose coming into Mr. Dundas' office in the middle of July, 1942; any information that we had he was mixed up in anything that was unlawful was just hearsay. [R. 321.]

As to why I didn't arrest him, we had nothing to arrest Mr. Rose for. This investigation was not secretive at all. Practically everything I learned I discussed with Mr. Rose. [R. 322.]

As to whether my office, on the occasion when he said that Mr. Goodman was representing him and that I would get the invoices from you and whether I didn't get invoices sent to the Office of Price Administration from your office in which you gave my office copies, not only of all the purchases made by Mr. Rose which have been testified to in this case, the one in Ontario, the one in Pasadena, but also copies of the invoices showing the sales to the Golden Lubricants—I picked them up at your office on one occasion, after calling you for them, and they were not as I had asked for them.

Mr. Goodman: Now, I demand that they be produced at this time, and I understand you have them here, Mr. Norcop. [R. 323.]

Mr. Norcop: Do you want us to produce now what you asked about?

Mr. Goodman: I would like to do it through the witness, Your Honor.

As to whether it is fact that I received from your office a copy of the purchase by Mr. Rose of the tires from the location in Ontario, is the last one I called you for, this is the one you sent to me through the mail, a copy of the purchase from Ontario.

(Counsel has handed the witness a document from the files and records of Government counsel.)

As to Government Exhibit 14, I did not receive that portion of the exhibit which is the first document in the exhibit, which is invoice 7441, along with the document which you first showed me, which is a copy of that invoice. I knew about it before, and then when I got the copy of the invoice, I knew the number of tires, the number of tubes, and the purchase price. [R. 324.]

(The document referred to was marked Defendant's Exhibit No. 8 for identification.)

This other document, which also comes from the Government counsel's files and records, I believe I did receive that document from your office. I did not ask you for certified copies, I asked you to have Mr. Rose have this certified as being correct and a legitimate sale by Mr. Rose. Mr. Rose's signature was already on it.

As to evidence a sale to the Golden Lubricants, which is Government's Exhibit 28, I am not sure that this particular sale and transaction was not previously brought to the attention of the court and jury. I was in your office before the trial. I picked up the documents that I asked for; I have not been back there since. [R. 325.]

(The document referred to was marked Defendant's Exhibit C for identification.)

As this copy of invoice which also comes from the files and records of Government counsel, Government's Exhibit No. 10, Mr. Rose, through you, furnished me with a copy of that invoice which I picked up at your office, at my request.

(The document referred to was marked Defendant's Exhibit D for identification.)

As to this copy of another invoice dated September the 5th, 1942, and whether I got that from your office along with the other documents which I have previously identified, yes, I picked this up—well, I got it from your office, at any rate. That Mr. Rose claimed that he sold 48 new tires and 130 new tubes to the Golden Lubricants, Inc., on September the 5th, 1942, I knew that prior to picking it up; that is why I asked for it. I asked Mr. Rose what he did with [R. 326] the tires. He told me he sold them to Joe Munn, like he did the rest of them.

(The document referred to was marked Defendant's Exhibit F for identification.)

I couldn't tell you whether that is the same Joe Munn whose name appears on the invoice of September 5, 1942, as a representative of Golden Lubricants, Inc.

Before the indictment was returned in this case, I either had knowledge from sources other than Mr. Rose, or from Mr. Rose directly, or through you as his attorney, of all of the purchases of tires and tubes from the four transactions which have been related in this courtroom that he purchased, but I don't believe I did on the Slavett tires. I received the documents for every purchase that I asked for. [R. 327.]

I discovered the sale of the new tires and tubes to Mr. Rose by Mr. Slavett when I called on Mr. Humbert of the Bay Cities Transfer Company. He told me that he had picked up tires at that address. I had not previously to that date made arrangements with Mr. Humbert that he was to notify me of any and all movements of tires made on behalf of Mr. Rose. I made such arrangements upon that call that I found out he had picked up tires at 1850 East Colorado, Pasadena, California. [R. 328.]

As to whether I parked my car on many occasions a half a block south of Olympic and Hill at one of the parking stations of Mr. Rose, I never did. I parked at a lot across the street; it has no name on it, to the best of my knowledge. [R. 329.] I paid for my parking every time I ever parked. As to whether I know that is Mr. Rose's parking lot, Mr. Rose was never there. I saw him in front of the lot on one occasion.

On the occasion when I went out to 613 North Virgil Avenue when these pictures were taken [R. 330] I did not know that those tires belonged to Ben Rose. I never did find out definitely that they belonged to Mr. Rose because he denied that they belonged to him. Whether the police officer took the key out of his pocket against his will, he still denied that they were his. I couldn't say that I know now that they are his tires. I have a pretty good idea, but I couldn't state that I know that they are his.

Mr. Goodman: I ask that those four tires from the Hertz car, or one of them at least, be brought into the court room.

As to those four tires that came from the Hertz Driverless Company, I picked them up there, around October the 5th. I made a record of the pick-up of those tires. [R. 331.]

As to this one of these tires and this white tab, that is in my handwriting. I wrote that at that time.

(Counsel reads.)

"Ben Rose—Picked up a Hertz-U-Drive October 5-42—Foster."

My conclusion, that they were Ben Rose's tires, was not based upon—that is, the record that I made here, that tab, was not based upon what the gentleman told me at the U-Driver's place. Those are some of the tires that were at 3200 City Terrace. I knew that Benjamin Rose picked up those tires. I know that because Mr. Humbert told me. [R. 332.] Prior to the time that I went there, I had not called the Wilshire police station and asked for two officers to come out, particularly Officer Hamilton. I called them after I found the warehouse. After I saw Mr. Rose on the first occasion that day. I called the police officer to see what was in the warehouse, and I did not have any powers at all to go in that warehouse to find out who it belonged to, or anything else. At that time I did not have a search warrant. I did not ask the police officer to get one. I did not at any time ask the police officer Hamilton to open up the place, to get the keys from Mr. Rose.

As to whether I recall telling him "There are some new tires and tubes stored in this place. We would like to get in there"—I told him we would like to get in there, yes. [R. 333.]

I took an inventory of 67 tires plus the nine that were taken into the police station. The nine tires that were taken to the police station were the only tires not wrapped at all. Mr. Rose was not [R. 334] there all that time. I believe Mr. Rose left toward the end.

There were nine tires unwrapped. I suggested the only ones Officer Hamilton take would be the ones which were unwrapped. I did not ask Officer Hamilton to take the tires. He took them voluntarily. I did not later get a telephone call from Mr. Hamilton telling me that he was going to release the tires to Mr. Rose. I got one from Hamilton asking me if he could release them. I told him no, I would refer it to Mr. Dundas. I believe I talked to Mr. Dundas. Then I told him, so far as I was concerned, "You will have to have them there." I don't believe Mr. Dundas told me to release them. At that time Officer Hamilton did not tell me over [R. 335] the phone that he had already told Mr. Rose to come up and get his tires. He told me, if I recall, that Mr. Rose was up there in a truck to pick them up. After speaking to me, he told me he would tell Mr. Rose he couldn't deliver the tires. Mr. Rose did not tell me that these tires from the warehouse at 613 North Virgil had been sold to the United States Defense Supply Corporation. I did not ever check to see.

(Counsel shows the witness a document.)

That's the first time I ever saw that. I have seen a form of that kind before. I know what it is. It shows a purported sale to the Defense Supply Corporation of the United States Government. That does not require a certificate.

(The document referred to was marked Defendants' Exhibit F for identification.) [R. 336.]

Cross-Examination

By Mr. Angelillo:

The first occasion that I saw Mr. Vitagliano I did not ascertain whether he had one or more service stations at that time. I found out subsequently that he had two. I never knew Signal Motor Service belonged to him. I know where that is, but I never knew that it belonged to Vitagliano. I have been to Stanford Motor Service. I knew that was his.

(Two letters are produced.)

As to these two letters, I saw two similar. I imagine they are the same ones.

(The documents referred to were marked Defendants' Exhibit G for identification.)

I saw these two letters either on May 26th, or the following call that I made to Mr. Vitagliano. I discussed the contents of these two letters. Mr. Vitagliano showed us the letters, and told us that he had authority to sell a few tires that he had, and that this was his authority, and we told him that Mr. D'Orr was wrong on it; that had he come out and looked at the tires he would have been wrong, but up to that date it was probably all right, as long as he had the authority for Mr. D'Orr. [R. 337.]

The freeze order was effective on new tires December 12, 1941, at midnight. The freeze was continuous from that day to now on new tires, under regulations. We had regulations handed to us by our office. I became an officer of the OPA office the first of April, 1942.

As to Exhibit No. 30, I got that from W. J. "Bill" Davis. I checked the Office of the State Board of Equali-

zation at 1031 South Broadway. I checked the Department of Motor Vehicles. I asked for the license number, because Davis had told me he was not sure what kind it was. I couldn't say who wrote the word "International" on that. It was on there when I got it. I have not had occasion to check the books of Mr. Vitagliano.

As to whether I have had occasion to check the original inventory at our office, pertaining to Mr. Vitagliano, I don't believe we have, not to my knowledge, an inventory at our office of Mr. Vitagliano. An inventory is made by any service man if he had tires on or about January 5, 1942, indicating the number of tires he had in his possession. [R. 338.]

As to this truck that Mr. Graham testified about here the other day, there was some transaction had on or about September 9, 1942, wherein Mr. Vitagliano was a purchaser or in any wise connected with that transaction. [R. 339.]

I saw Mr. Vitagliano once, I believe, at our office, and once at his station. He told me he was not worried at all about the case from the start. He told me that his skirts were clean. [R. 340.]

By Mr. Norcop:

(By the Witness): I had a conversation with Mr. Rose regarding Joe Munn. Mr. Rose asked me if I had found Joe Munn yet. I laughed and said, "Oh, sure, I found him." He said, "That's a good thing, because I have sold him some more tires."

SAMUEL KILBURN DOWDEN,

on

Direct Examination,

testified as follows:

By Mr. Norcop:

In 1942 I was a truck driver for the Bay Cities Moving & Storage in Los Angeles. [R. 341.] Last summer I went with one of the trucks of that concern to Ontario. There were two trucks. Don Parmalee was the other driver. We went to a residence. I see some one here in court now that I saw at that residence on that date, known to me as Sam Blank. I did not see anyone else among the people sitting to your left there—not for certain.

After the trucks were loaded I drove one of them back into town, to, I think it was about 613 on Virgil. I unloaded it there. [R. 342.]

Cross-Examination

By Mr. Goodman:

I did not see this man sign: Ben Rose. I turned the copy of that invoice over to Mr. Humbert. Before I came to testify here today I discovered that Ben Rose had signed that delivery ticket. I knew it was Rose before I came to court here.

WILLIS S. STORMS,

on

Direct Examination,

testified as follows:

By Mr. Norcop:

I am an investigator for the Office of Price Administration, an agency of the United States Government. I entered that employment May [R. 343] 1st, 1942.

After I arrived at 955 South Hill I saw an attendant there. [R. 344.]

I returned about 2:00 o'clock in the afternoon, June 24th. I came back at 5:00 o'clock. I saw a man that represented himself to be Benjamin Rose or Ben Rose. I had a conversation with him. No one else was present there in hearing of the conversation. [R. 345.] I saw Ben Rose at the same location, 955 South Hill Street. I had another conversation with him. There was present in the hearing of the conversation a young man known to me or introduced himself to me as David Rose, said that he was Ben Rose's brother. That was all that was present in the hearing of my voice, so far as I know. Ben Rose immediately started to question me again as to my identity.

He said, "I have got to know something about you." And I said to Rose, "I thought we had discussed that yesterday." He said, "Well, who are you?" And I said, "It is none of your business." And I repeated, "You are not going to get me into any trouble and I haven't got any papers." He said, "I am not worried about that and I can't afford to take any chances." I said, "Well, what about the tires? Where are they?" He said, "Well, we have to go over here a few blocks." He said, "What did you decide on?" I said, "Two new 6.50 x 16 tires and two new retreaded tires."

Ben Rose and his brother and I started to walk off the lot when the defendant said, "Well, let's get in your car," meaning my car. I started the car and had driven ap-

proximately 25 or 30 feet when the defendant asked me to stop, and both he [R. 347] and his brother got out of the car and walked over a short distance, I would say 20 feet or 30 feet, to the parking lot attendant. He came back and said, "I guess we can't do no business, Mr." I just brandished my hand casually, got in my car and drove off the lot.

Cross-Examination

By Mr. Goodman:

I was not exactly going to try to get him to make a sale. It is not a fact that the man I saw the first and second times was David Rose, and not this gentleman here, Ben Rose. [R. 348.] When there was no deal made and they told me they couldn't sell me any tires, I got in my car and drove away. I went over to my office.

I think I met Mr. Foster on the street. While I was in there trying to make this deal, he was across the street. I picked him up I believe on Hill Street, between Tenth and Eleventh. When I left Mr. Rose and his brother, I met Foster less than five minutes. At that time I had a conversation with Mr. Foster. I told him what transpired. [R. 349.]